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Testing the Reliability of Coconspirators' Statements Admitted under Federal Rule of Evidence 801(d)(2)(E): Putting the Claws Back in the Confrontation Clause

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Comment

TESTING THE RELIABILITY OF COCONSPIRATORS' STATEMENTS ADMITTED UNDER FEDERAL RULE OF EVIDENCE 801(d)(2)(E): PUTTING THE CLAWS BACK IN THE CONFRONTATION CLAUSE

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I. INTRODUCTION: HISTORICAL DEVELOPMENT OF THE CONFLICT

Prior to the enactment of the Federal Rules of Evidence,¹ it was well established that certain out-of-court statements made by a member of a conspiracy were admissible at trial against a coconspirator under an exception to the hearsay rule.² This coconspirator exception originally

1. FED. R. EVID. 101-1103. The Federal Rules of Evidence were signed into law January 2, 1975, and became effective 180 days thereafter. Pub. L. No. 93-595 § 2, 88 Stat. 1926 (1974).

2. *Anderson v. United States*, 417 U.S. 211, 218-19 (1974). The *Anderson* Court noted that "[t]he doctrine that declarations of one conspirator may be used against another conspirator, if the declaration was made during the course of and in furtherance of the conspiracy charged, is a well-recognized exception to the hearsay rule which would otherwise bar the introduction of such out-of-court declarations." *Id.* at 218. See generally Levie, *Hearsay and Conspiracy: A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule*, 52 MICH. L. REV. 1159 (1954); Comment, *The Hearsay Exception for Co-Conspirators' Declarations*, 25 U. CHI. L. REV. 530 (1958).

was rationalized in the context of an agency theory of conspiracy.³ Courts reasoned that coconspirators, like partners, were liable for each other's acts and statements.⁴ Thus, a statement by one conspirator could be used to implicate all other members of the conspiracy.

Although the agency model of conspiracy was dismissed by the drafters of the Federal Rules of Evidence as "a fiction,"⁵ they chose to adopt the coconspirator hearsay rule as it had existed at common law.⁶ Commentators have attempted to explain the continued use of the rule by noting that it is justified by the difficulties of proving conspiracy at trial.⁷ It has been asserted that the very essence of any conspiracy—an agreement to commit an illegal act⁸—necessitates secrecy.⁹ Because such secret agreements rarely are provable by other than circumstantial evidence, it is maintained that relaxation of the hearsay rule is warranted

3. *United States v. Gooding*, 25 U.S. (12 Wheat.) 460, 468-70 (1827). *Gooding* involved a prosecution for a violation of the Slave Trade Act. *Id.* at 461. The first issue the Court decided was whether incriminating out-of-court statements by the captain of a ship engaged in transporting slaves were properly admissible against the owner of the ship. *Id.* at 468-70. The Court permitted the admission of the statements, reasoning that a principal is responsible for the authorized acts of his agents in criminal as well as civil proceedings. *Id.* at 469. The Court concluded that "in cases of conspiracy and riot, when once the conspiracy or combination is established, the act of one conspirator, in the prosecution of the enterprise, is considered the act of all, and is evidence against all." *Id.* For a discussion of the development of the agency theory of conspiracy, see *Levie*, *supra* note 2, at 1163-65.

4. *Van Riper v. United States*, 13 F.2d 961, 967 (1926). In *Van Riper*, Judge Learned Hand stated, "When men enter an agreement for an unlawful end, they become ad hoc agents for one another, and have made 'a partnership in crime.' What one does pursuant to their common purpose, all do, and, as declarations may be such acts, they are competent against all." *Id.* (citing *Hitchman C. & C. Co. v. Mitchell*, 245 U.S. 229, 249 (1917)).

5. FED. R. EVID. 801(d)(2)(E) advisory committee note. The Advisory Committee observed that although rule 801(d)(2)(D), which excludes statements by a party's agent from the definition of hearsay, expanded the evidentiary view of agency, "the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established." *Id.*

6. FED. R. EVID. 801(d)(2)(E). For a further discussion of the federal enactment of the conspirator hearsay rule, see *infra* notes 20-21 and accompanying text.

7. *Levie*, *supra* note 2, at 1166 (there is "great probative need" for coconspirators' declarations); Comment, *supra* note 2, at 540 ("admission of co-conspirators' hearsay declarations is justified by necessity"). It also has been asserted that the coconspirator hearsay rule has been perpetuated by prosecutors because it makes criminal convictions easier to obtain. R. LEMPERT & S. SALTZBURG, *A MODERN APPROACH TO EVIDENCE* 378 (1977).

8. *Ianelli v. United States*, 420 U.S. 770, 777 (1975) ("Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act.").

9. *Blumenthal v. United States*, 332 U.S. 539, 557 (1947). In *Blumenthal*, the Court observed, "Secrecy and concealment are essential features of successful conspiracy. The more completely they are achieved, the more successful the crime." *Id.*

to facilitate successful prosecution of cases involving conspiracy.¹⁰

Although there is a strong public policy favoring evidentiary rules which facilitate the use of relevant testimony in the prosecution of criminal proceedings,¹¹ the Supreme Court of the United States consistently has interpreted the sixth amendment's confrontation clause to require that only trustworthy evidence be admissible against a criminal defendant.¹² The Court has identified two categories of evidence that qualify as trustworthy. The first is evidence that is subject to cross-examination at trial.¹³ The second is evidence that is inherently trustworthy because it bears sufficient indicia of reliability.¹⁴ When out-of-court statements

10. *Levie*, *supra* note 2, at 1159-61, 1166; Comment, *supra* note 2, at 540. Necessity generally is asserted as the only rational basis for the continued use of the coconspirator hearsay rule. *Levie*, *supra* note 2, at 1166. There is "great probative need" for coconspirator declarations at trial, because conspiracy is difficult to prove. *Id.* Reliance on circumstantial evidence to prove an illegal agreement poses several problems for prosecutors:

Typically, the jury is asked to draw an inference of agreement from conduct which seems to be following some plan. But such use of circumstantial hypothesis is subject to inherent limitations. If the conspiracy is apprehended early or discontinued there is little conduct from which to draw the inference. Besides, alternative explanations of whatever conduct there was may exist and make it difficult to prove guilt beyond all reasonable doubt.

Id. at 1160.

In addressing the difficulties of proving conspiracy, courts have emphasized that conspiratorial conduct must be deterred because it poses a serious threat to society. *See United States v. Rabinowich*, 238 U.S. 78, 88 (1915). In *Rabinowich*, the Court observed:

For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws, is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered.

Id.

11. *See Ohio v. Roberts*, 448 U.S. 56, 64 (1980) (noting that every jurisdiction has a strong interest in developing rules of evidence to promote effective law enforcement).

12. *See, e.g., id.* at 65-66 (purpose of confrontation clause is to bolster accuracy of fact finding process). For a further discussion of the Supreme Court's requirement of trustworthiness, see *infra* notes 153-200 and accompanying text.

13. *See, e.g., California v. Green*, 399 U.S. 149, 164 (1970) (out-of-court hearsay statements may be admissible in compliance with confrontation clause if declarant is available for cross-examination).

14. *See, e.g., Dutton v. Evans*, 400 U.S. 74, 89 (1970) (hearsay statement that was not subject to cross-examination held admissible in compliance with the confrontation clause because it bore sufficient indicia of reliability). For a further discussion of the indicia of reliability considered sufficient to meet the confrontation clause's requirements, see *infra* notes 179-200 and accompanying text.

are introduced into evidence by a third party under an exception to the hearsay rule, they must meet this second test of trustworthiness because the statements are not subject to cross-examination.¹⁵

Currently there is a split among the federal courts of appeals over the question of whether statements admitted under the federal version of the coconspirator hearsay rule meet the confrontation clause's requirement of reliability.¹⁶ This comment traces the development of the rule as it has been applied by the various federal courts of appeals, attempts to identify the guarantees of reliability that exist with respect to evidence admitted under the rule, and traces the Supreme Court's interpretation of the confrontation clause to its current status. In addition, this comment sets forth the split among the circuits over the application of the confrontation clause to the coconspirator hearsay rule, and suggests a resolution to this conflict.

II. THE COCONSPIRATOR HEARSAY RULE—FEDERAL RULE OF EVIDENCE 801(d)(2)(E)

Article VIII of the Federal Rules of Evidence contains the federal codification of the hearsay rule and its exceptions.¹⁷ Hearsay is defined therein as any out-of-court statement offered "to prove the truth of the matter asserted."¹⁸ Unless an exception to the hearsay rule applies,

15. See Garland & Snow, *The Co-Conspirators Exceptions to the Hearsay Rule: Procedural Implementation and Confrontation Clause Requirements*, 63 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 1, 3-4, 14-15 (1972).

16. *Sanson v. United States*, 104 S. Ct. 3559 (1984) (White, J., dissenting from denial of certiorari), *denying cert. to* 727 F.2d 1113 (7th Cir. 1984).

17. FED. R. EVID. 801-806. Article VIII of the Federal Rules adopts the common law approach of creating a general prohibition against hearsay, and then carving out exceptions to the rule. FED. R. EVID. art. VIII advisory committee note. The hearsay exceptions are contained in two rules. One applies to situations in which the declarant is unavailable to testify, and the other applies to situations in which the availability of the declarant is immaterial. FED. R. EVID. 803 (availability immaterial); FED. R. EVID. 804 (declarant must be unavailable). However, the Federal Rules diverge from the common law in defining hearsay. Certain kinds of statements that had been considered hearsay at common law and treated as exceptions to the hearsay rules are specifically excluded from the definition of hearsay under the Federal Rules. See FED. R. EVID. 801(d) ("Statements which are not hearsay."). See also 4 D. LOUISELL & C. MUELLER, *FEDERAL EVIDENCE* § 411 (1980); S. SALTZBURG & K. REDDEN, *FEDERAL RULES OF EVIDENCE MANUAL* 496-98 (3d ed. 1982).

18. FED. R. EVID. 801(c). Rule 801 provides in pertinent part:
The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

FED. R. EVID. 801.

hearsay statements are not admissible into evidence.¹⁹ However, the Federal Rules of Evidence classify certain statements made by coconspirators as party admissions, excluding them from the rules' definition of hearsay.²⁰ Accordingly, under rule 801(d)(2)(E), an out-of-court statement offered against a member of a conspiracy is admissible if it was made by a coconspirator "during the course and in furtherance of the conspiracy."²¹

19. FED. R. EVID. 802. Rule 802 provides in pertinent part: "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." *Id.* Exceptions to the hearsay rule are set forth in rules 803 and 804. Certain other statements that would be hearsay under rule 801(c) are excluded from the definition of hearsay by rule 801(d), and are therefore admissible at trial. FED. R. EVID. 801(d). Some exceptions to the hearsay rule also are found outside the Federal Rules of Evidence. *See, e.g.*, FED. R. CIV. P. 32 (admissibility of depositions at trial); FED. R. CRIM. P. 4(a) (admissibility of affidavits to show grounds for issuing warrants); 29 U.S.C. § 161(4) (1982) (admissibility of affidavits as proof of service in National Labor Relations Board proceedings).

20. FED. R. EVID. 801(d)(2)(E). For the text of rule 801(d)(2)(E), see *infra* note 21. The Advisory Committee reasoned that party admissions are omitted from the definition of hearsay under the Federal Rules on the theory that a party may not object to statements he has made or caused to be made. *See* FED. R. EVID. 801(d)(2) advisory committee note; S. SALTZBURG & K. REDDEN, *supra* note 17, at 501. The Committee further reasoned that although admissions provide little guarantee of trustworthiness, they are admissible because of the requirements of the adversary system. FED. R. EVID. 801(d)(2) advisory committee note. In addition, rule 801(d)(2)(E) is a departure from the agency theory of admission for coconspirators' statements. FED. R. EVID. 801(d)(2)(E) advisory committee note. On the other hand, rules 803 and 804 of the Federal Rules of Evidence create exceptions to the hearsay rule for statements that meet a minimum standard for trustworthiness. *See* FED. R. EVID. 803 advisory committee note ("under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness"); FED. R. EVID. 804(b) advisory committee note (hearsay testimony may be admitted "if the declarant is unavailable and if his statement meets a specified standard"). For a discussion of the trustworthiness of coconspirators' statements, see *infra* notes 202-24 & 236-52 and accompanying text.

Prior to the adoption of the Federal Rules of Evidence, federal courts treated coconspirators' statements as exceptions to the hearsay rule. *See, e.g.*, *Anderson v. United States*, 417 U.S. 211, 218-19 (1973) (coconspirator hearsay rule is a "well recognized exception to the hearsay rule"). It was originally thought that redefining coconspirators' statements as "not hearsay," rather than creating an exception to the hearsay rule, would have little practical effect on the admissibility of the statements. S. SALTZBURG & K. REDDEN, *supra* note 17, at 501. This distinction, however, recently has been cited in determining whether admission of a coconspirator's statement violated the sixth amendment's confrontation clause. *See United States v. Ammar*, 714 F.2d 238, 255 (3d Cir.) (rationale for admission of coconspirator's statement under rule 801(d)(2)(E) differs from the rationale for admission of exceptions to the hearsay rule under rules 803 and 804), *cert. denied*, 104 S. Ct. 344 (1983). *But see United States v. Smith*, 578 F.2d 1227, 1231 n.6 (8th Cir. 1978) (under Federal Rules of Evidence "distinction between a statement which is not hearsay and a statement which is an exception to the hearsay rule is semantic and not outcome determinative").

21. FED. R. EVID. 801(d)(2)(E). Rule 801(d)(2)(E) provides that "[a] state-

A. *Prerequisites to Admission under Rule 801(d)(2)(E)*

Courts have interpreted rule 801(d)(2)(E) to require that an offering party satisfy three criteria before a coconspirator's statement is admitted into evidence. The offering party must demonstrate (1) that a

ment is not hearsay if . . . (2) [t]he statement is offered against a party and is . . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." *Id.* In adopting this provision, the Senate stated that it was enacting the "long-accepted" rule governing the admission of coconspirators' statements, and determining that such statements are not considered hearsay. FED. R. EVID. 801 note of Senate Committee on the Judiciary. For a discussion of the difference between the coconspirator rule applied under the Federal Rules of Evidence and at common law, see generally Recent Development, *Evolution of the Coconspirator Exception to the Hearsay Rule in the Federal Courts*, 16 NEW ENG. L. REV. 617 (1981).

It has been noted that rule 801(d)(2)(E) is the most frequently cited provision of article VIII of the Federal Rules of Evidence. D. LOUISELL & C. MUELLER, *supra* note 17, § 427, at 331.

It should be recognized that if an out-of-court declaration by a coconspirator constitutes a verbal act, it is not necessary to assert rule 801(d)(2)(E) when offering that declaration into evidence. S. SALTZBURG & K. REDDEN, *supra* note 17, at 502-03. A verbal act is a statement that affects the legal rights of a party at trial merely because of the fact that the statement was made. *See* FED. R. EVID. 801(c) advisory committee note. The statement itself constitutes a legally significant act, and when introduced into evidence it is not considered to be offered to prove the truth of the matter asserted. *Id.* Verbal acts are admissible at trial because they fall outside the purview of hearsay as defined in rule 801(c). *Id.* In the context of a conspiracy proceeding, statements that constitute acts of the conspiracy have independent legal significance and are admissible as verbal acts without reference to rule 801(d)(2)(E). *See, e.g.,* Anderson v. United States, 417 U.S. 211, 219-22 (1974) (false testimony that proved existence of conspiracy and defendants' motive in voting fraud prosecution was not introduced for truth of the matter asserted and therefore was not hearsay); United States v. Romano, 684 F.2d 1057, 1066 (2d Cir.) (in prosecution for conspiracy to violate racketeering statute (RICO), requests to give money to "the boys in the union" were admissible as "utterances contemporaneous with an independently admissible nonverbal act"), *cert. denied*, 459 U.S. 1016 (1982); United States v. Bruner, 657 F.2d 1278, 1284-85 (D.C. Cir. 1981) (prescription forms offered in trial for conspiracy to distribute narcotics were held admissible because they were offered as proof of means of obtaining drugs and not to prove truth of assertions contained in them). Although the range of statements that could be classified as verbal acts of a conspiracy is very broad, at least one commentator has suggested that the category must be narrowly construed:

In the final analysis, there are really only three types of coconspirator declarations that can justifiably be considered "acts" in these cases: the statements of the conspirators to each other that constitute the conspiracy itself (*i.e.*, the agreement to commit the criminal act and the planning of that act), any statements to others that would themselves constitute a crime (such as one conspirator's offer of a bribe as part of the group's plans), and any statements that are properly admissible under the substantive law of conspiracy as "overt acts" of the conspiracy.

Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378 (1972).

conspiracy existed, and that both the declarant²² and the defendant were members of that conspiracy;²³ (2) that the statements offered were made "during the course" of the conspiracy;²⁴ and (3) that the statements were made "in furtherance" of the conspiracy.²⁵

Aside from the guarantees of the confrontation clause, these three prerequisites to admissibility under rule 801(d)(2)(E) stand as the only means of safeguarding the reliability of coconspirators' statements that are admitted into evidence.²⁶ These prerequisites were developed primarily as assurances that coconspirators' statements would be admitted in compliance with principals of agency law.²⁷ For example, the requirements that a statement be made "during the course and in furtherance of a conspiracy" are analogous to the scope-of-employment requirement for liability under *respondeat superior*.²⁸ Similarly, the requirement that an underlying conspiracy be proved precedent to admission of a conspirator's statement parallels the idea that agency may not be proved on the word of an agent alone.²⁹ The following sections will explore the devel-

22. FED. R. EVID. 801(b). A "declarant" is defined as "a person who makes a statement." *Id.*

23. For a discussion of the requirement of membership in the conspiracy, see *infra* notes 33-37 and accompanying text.

24. For a discussion of the requirement that statements be made "during the course" of the conspiracy, see *infra* notes 117-36 and accompanying text.

25. For a discussion of the "in furtherance" requirement, see *infra* notes 137-52 and accompanying text.

26. See Davenport, *supra* note 21, at 1385-91. Davenport argues that the prerequisites to admission of a coconspirator's statement are inadequate assurances of reliability. *Id.*

27. Levie, *supra* note 2, at 1161. Levie notes that "[a]ll three conditions of admissibility [for coconspirators' statements] . . . resemble principles of agency." *Id.* These prerequisites to admissibility were well established prior to the enactment of rule 801(d)(2)(E). See *United States v. Nixon*, 418 U.S. 683, 701 & n.14 (1974); *Anderson v. United States*, 417 U.S. 211, 218-19 (1974); *Krulewitch v. United States*, 336 U.S. 440, 442-43 (1949). However, the interpretation of these prerequisites has changed drastically since the adoption of the Federal Rules of Evidence. See 4 D. LOUISELL & C. MUELLER, *supra* note 17, § 427; S. SALTZBURG & K. REDDEN, *supra* note 17, at 502-12; 4 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* 801(d)(2)(E)[01], at 801-233 to -249 (1984); Kessler, *The Treatment of Preliminary Issues of Fact in Conspiracy Litigations: Putting the Conspiracy Back into the Coconspirator Rule*, 5 HOFSTRA L. REV. 77, 88-89 (1976); Marcus, *Co-Conspirator Declarations: The Federal Rules of Evidence and Other Recent Developments, From a Criminal Law Perspective*, 7 AM. J. CRIM. L. 287, 290-307 (1979); Comment, *Co-conspirator Declarations: Procedure and Standard of Proof for Admission Under the Federal Rules of Evidence*, 55 CHI.-[]KENT L. REV. 577 (1979); Recent Development, *supra* note 21; Note, *Inconsistencies in the Federal Circuit Courts' Application of the Co-Conspirator Exception*, 39 WASH. & LEE L. REV. 125 (1972).

28. Levie, *supra* note 2, at 1161, 1167-68. See also FED. R. EVID. 801(d)(2)(D) (authorizing admission against principal of statements made by his agent "concerning a matter within the scope of his agency . . . made during the existence of the relationship").

29. Levie, *supra* note 2, at 1176. Most federal courts require that an underlying conspiracy be proved by the use of independent, nonhearsay evidence before a statement is admitted under rule 801(d)(2)(E). *Id.* For a further discus-

opment of rule 801(d)(2)(E)'s foundational prerequisites, and the assurances of reliability they provide as they have been applied by the federal courts.

1. *Existence of the Conspiracy*

Proving the existence of a conspiracy is the most crucial foundational element of rule 801(d)(2)(E), because it is a precondition to proving the other two elements.³⁰ Whether acts of a conspirator will be deemed to have occurred "during the course of" or "in furtherance of" a conspiracy will necessarily depend upon proof of the underlying event.³¹ When stringent standards must be met to demonstrate the existence of a conspiracy, there is a diminished likelihood that statements made outside the parameters of the conspiracy will be admitted into evidence.³²

The rule requires the offering party to prove the existence of the conspiracy and to link the conspiracy to both the declarant and the defendant.³³ However, the rule does not require a quantum of proof sufficient to convict the defendant of the substantive crime of conspiracy.³⁴ For the purposes of rule 801(d)(2)(E), conspiracy means only that the declarant and the defendant were engaged in a joint enterprise.³⁵ Thus,

sion of the requirement of independent proof of conspiracy, see *infra* notes 97-116 and accompanying text.

30. See *United States v. Gil*, 604 F.2d 546, 547 (7th Cir. 1979) ("existence of a conspiracy is an obvious necessary precondition before [rule 801(d)(2)(E)] comes into play").

31. Recent Development, *supra* note 21, at 620-21. It is not possible to prove that a statement was made in furtherance or during the course of a conspiracy without proof of the conspiracy itself. *Id.*

32. For a discussion of the burden of proof required to establish the existence of a conspiracy, see *infra* notes 46-71 and accompanying text. For an analysis of the "independent evidence" requirement, see *infra* notes 97-116 and accompanying text. For a discussion of the confrontation clause and its concomitant preoccupation with the reliability of evidence, see *infra* notes 153-224 and accompanying text.

33. *Glasser v. United States*, 315 U.S. 60, 74-75 (1942) (coconspirators' statements are only admissible if there is proof *aliunde* of conspiracy and of defendant's connection to it); *United States v. Ordonez*, 737 F.2d 793, 801 (9th Cir. 1984) (otherwise inadmissible hearsay statements of coconspirators are admissible when there is independent proof of both existence of conspiracy and connection of declarant and defendant to it); *United States v. Lyles*, 593 F.2d 182, 195 (2d Cir.) (under rule 801(d)(2)(E) government must show conspiratorial relationship between parties), *cert. denied*, 440 U.S. 972 (1979).

34. *United States v. Gil*, 604 F.2d 546, 548-49 (7th Cir. 1979). Conspiracy as an evidentiary principle and conspiracy as a substantive crime are not the same. *Id.* Conspiracy as a crime includes "elements such as meeting of the minds, criminal intent and, where required by statute, an overt act." *United States v. Trowery*, 542 F.2d 623, 626 (3d Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977).

35. FED. R. EVID. 801(d)(E) note of Senate Committee on the Judiciary. The Senate committee reasoned that while rule 801(d)(2)(E) "refers to a coconspirator," the committee understood "that the rule is meant to carry forward the

the rule may be invoked against coconspirators³⁶ in a judicial proceeding even though the crime of conspiracy has not been charged.³⁷

Although proof of the existence of a conspiracy is a uniformly accepted prerequisite to the admission of coconspirators' statements under rule 801(d)(2)(E), the standards and criteria used to make this foundational determination vary significantly among the federal circuits.³⁸ Prior to the enactment of the Federal Rules of Evidence, proof of the foundational requirements of the coconspirator hearsay rule generally was submitted to the jury for a determination of admissibility.³⁹

universally accepted doctrine that a joint venturer is considered as a coconspirator for the purposes of this rule." *Id.*

36. *United States v. Anderton*, 679 F.2d 1199, 1202-03 (5th Cir. 1982). Coconspirator statements may only be offered *against* a party to a conspiracy. *Id.* at 1202. A conspirator may not use rule 801(d)(2)(E) to introduce evidence in his own behalf. *Id.* at 1203.

37. *United States v. Kiefer*, 694 F.2d 1109, 1112 n.2 (8th Cir. 1982) ("a defendant need not be charged with the crime of conspiracy to involve the coconspirator exception") (citing *United States v. Miller*, 644 F.2d 1241, 1244 n.5 (8th Cir.), *cert. denied*, 454 U.S. 850 (1981)); *United States v. McManaman*, 606 F.2d 919, 926-27 (10th Cir. 1979) (statements of unindicted coconspirators are admissible under rule 801(d)(2)(E)). Rule 801(d)(2)(E) may even be involved in cases where a declarant has been acquitted on conspiracy counts. *United States v. Gil*, 604 F.2d 546, 548-49 (7th Cir. 1979). *See D. LOUISELL & C. MUELLER, supra* note 17, § 427, at 334-36. Although an acquittal may be "relevant and persuasive" to the admissibility of a coconspirator's statements, it is not dispositive because the standard necessary to prove the existence of a conspiracy for purposes of rule 801(d)(2)(E) is a less stringent standard than proof beyond a reasonable doubt. *United States v. Gil*, 604 F.2d at 549. Thus, "neither collateral estoppel nor res judicata automatically bars use of statements by a person who has been acquitted of the crime of conspiracy." *Id.*

Coconspirator statements also may be admitted into evidence in civil proceedings. *See James R. Snyder Co. v. Associated Gen. Contractors*, 677 F.2d 1111, 1116-17 (6th Cir.) (coconspirator statements are properly admissible in civil antitrust action), *cert. denied*, 459 U.S. 1015 (1982); *Paul F. Newton & Co. v. Texas Commerce Bank*, 630 F.2d 1111, 1120-21 (5th Cir. 1980) (rule 801(d)(2)(E) statements held admissible in civil securities fraud action). *See also* FED. R. EVID. 1101(b). Rule 1101(b) provides: "These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under Title 11 of the United States Code." *Id.* For a discussion of the standard of proof necessary to establish the foundational elements of rule 801(d)(2)(E) in a civil action, *see* Case Comment, *The Standard of Proof for Admissions of Co-Conspirators' Out-of-Court Statements in Civil Litigation*, 12 MEM. ST. U.L. REV. 531 (1982) (burden of proof should be the same in criminal and civil proceedings). *But see* Bein, *Substantive Influences on the Use of Exceptions to the Hearsay Rule*, 23 B.C.L. REV. 855, 892-911 (1982) (burden of proof under rule 801(d)(2)(E) should not be the same in civil antitrust litigation as it is in general criminal litigation).

38. *Means v. United States*, 105 S. Ct. 541 (White, J., dissenting from denial of certiorari), *denying cert. to* 729 F.2d 1462 (1984). For a further discussion of the variances among the circuits, *see infra* notes 43-116 and accompanying text.

39. *See, e.g., United States v. James*, 590 F.2d 575, 578 (5th Cir.) (jury to be instructed that it could consider a coconspirator's statement "only if it first finds that the conspiracy existed, and that the declarant and the defendant were mem-

Under rule 104 of the Federal Rules of Evidence, however, all preliminary questions are to be decided by a judge alone.⁴⁰ Accordingly, all the circuits have withdrawn the admissibility determination from the jury.⁴¹ As a result, the foundational requirements for establishing the existence

bers of it, and that the statement was made during the course of and in furtherance of the conspiracy"), *cert. denied*, 442 U.S. 917 (1979). Several circuits, however, relegated the determination of admissibility of coconspirators' statements to the judge alone. *See* *United States v. Jones*, 542 F.2d 186, 203 (4th Cir.) (relying on pre-Federal Rules of Evidence case law), *cert. denied*, 426 U.S. 922 (1976); *United States v. Pisciotta*, 469 F.2d 329, 332-33 (10th Cir. 1972) (to have jury decide sufficiency of independent evidence would be valueless as it would only confirm what jury already had determined); *United States v. Bey*, 437 F.2d 188, 191-92 (3d Cir. 1971) (once judge has made initial determination, jury should not be given opportunity to second-guess him); *United States v. Geaney*, 417 F.2d 1116, 1119-20 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970); *Carbo v. United States*, 314 F.2d 718, 736-37 (9th Cir. 1963) (it is impossible to expect jury to compartmentalize evidence, separating that produced by hearsay declarations from other evidence), *cert. denied*, 377 U.S. 953 (1964).

A reflection of the jury's role in determining the adequacy of foundational evidence is found in the jury instructions used. For example, one model instruction reads in pertinent part:

Whenever it appears beyond a reasonable doubt from the evidence in the case that a conspiracy existed, and that a defendant was one of the members, then the statements thereafter knowingly made . . . by any person likewise found to be a member, may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the statements . . . may have occurred in the absence and without the knowledge of the defendant, provided such statements . . . were knowingly made and done during the continuance of such conspiracy, and in furtherance of some object or purpose of the conspiracy.

Otherwise, any admission or incriminatory statement made . . . outside of court, by one person, may not be considered as evidence against any person who was not present and did not hear the statement made.

E. DEVITT & C. BLACKMAR, *FEDERAL JURY PRACTICE AND INSTRUCTIONS* § 27.06, at 13-14 (1977). For a discussion of how rule 801(d)(2)(E) affects jury instructions, see *infra* notes 88-92 and accompanying text.

40. FED. R. EVID. 104(a). Rule 104 is titled, "Preliminary Questions," and provides in pertinent part:

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

FED. R. EVID. 104. *See also* *United States v. Petrozziello*, 548 F.2d 20, 22-23 (1st Cir. 1977) (rule 104(a) requires that questions of admissibility of coconspirator statements are to be decided by the judge alone).

41. For a list of cases from each circuit holding that the judge is the final arbiter of questions of admissibility of coconspirators' statements, see *infra* note 55.

of a conspiracy for purposes of rule 801(d)(2)(E) have been relaxed.⁴²

In making the transition from a jury-oriented to a judge-oriented decision-making process under rule 801(d)(2)(E), the courts of appeals have had particular difficulty resolving three issues of admissibility. The first issue involves the quantum of proof necessary to establish a conspiracy.⁴³ The second issue focuses on the effect of foundational evidence on the jury.⁴⁴ The third issue hinges on the necessity of using independent evidence to prove the conspiracy.⁴⁵

a. The Standard of Proof

In a criminal conspiracy trial, the prosecution has the burden of proving beyond a reasonable doubt both the existence of a conspiracy and the defendant's involvement in it.⁴⁶ For purposes of rule 801(d)(2)(E), however, a lesser standard of proof of conspiracy is applied.⁴⁷ In *United States v. Nixon*⁴⁸ the Supreme Court of the United States identified the standard in a dictum as "substantial independent evidence."⁴⁹ The majority of the federal courts, however, have not utilized the substantial independent evidence test primarily for two reasons: (1) the standard, as formulated in *Nixon*, provides little practical guidance for application,⁵⁰ and (2) following *Nixon*, the adoption of rule

42. Recent Development, *supra* note 21, at 624. Changes in the law relating to the admission of coconspirators' statements can be traced to the adoption of rule 104. *Id.* A certain degree of change also may be traced to the fact that rule 801(d)(2)(E) does not expressly codify the common law requirement of independent evidence. *Id.*

43. For a further discussion of the circuits' views on the standard of proof to be met in order to prove the foundational element of conspiracy, see *infra* notes 46-71 and accompanying text.

44. For a discussion of the effect of evidence admitted as foundation for rule 801(d)(2)(E), see *infra* notes 72-96 and accompanying text.

45. For a discussion of the requirement of independent evidence to prove the existence of a conspiracy under rule 801(d)(2)(E), see *infra* notes 97-116 and accompanying text.

46. C. McCORMICK, EVIDENCE § 341 (E. Cleary 2d ed. 1984).

47. See *United States v. Gibbs*, 739 F.2d 838, 843 & n.11 (3d Cir. 1984) (standard of proof required to prove conspiracy under rule 801(d)(2)(E) has been interpreted as either "fair preponderance of independent evidence" or "substantial independent evidence"), *cert. denied*, 105 S. Ct. 779 (1985). At least one commentator has argued, however, that the existence of a conspiracy should be proved beyond a reasonable doubt before a coconspirator's statement is admitted. Kessler, *supra* note 27, at 79-80, 86-88.

48. 418 U.S. 683 (1974).

49. *Id.* at 701 & n.14. In *Nixon*, the Court discussed the coconspirator hearsay rule as a possible ground for admission of evidence contained in tape recordings subpoenaed from the President of the United States. *Id.* at 700-02.

50. See Comment, *supra* note 27, at 592. Substantial independent evidence is an ambiguous standard. *Id.* It is not clear whether it is more lenient than standards of "proof beyond a reasonable doubt" or "by a preponderance of the evidence." *Id.* One circuit seems to have equated the substantial independent evidence standard with the prima facie standard. See *United States v. Dixon*, 562

104 shifted the burden of making foundational determinations from the jury to the judge, thereby reducing the quantum of proof needed to establish a foundation.⁵¹

Prior to the enactment of the Federal Rules of Evidence, most federal circuits applied a *prima facie* standard to the foundational requirements of the coconspirator hearsay rule.⁵² Under this standard, a party offering a coconspirator's statement into evidence had to present *prima facie* evidence of a conspiracy that, if unrebutted, would be adequate to support, but not to compel, a finding of conspiracy.⁵³ Currently, only the Ninth Circuit adheres solely to the *prima facie* standard.⁵⁴

A majority of the federal circuits have found that the underlying conspiracy must be proved by a preponderance of the evidence.⁵⁵ The

F.2d 1138, 1141 (9th Cir. 1977) (finding it well settled in Ninth Circuit that substantial independent evidence is "enough to make a *prima facie* case"), *cert. denied*, 435 U.S. 927 (1978). Several circuits employ a substantial independent evidence standard as the first prong of a two-pronged admissibility test. *See* United States v. Bulman, 667 F.2d 1374, 1379 (11th Cir.), *cert. denied*, 456 U.S. 1010 (1982); United States v. Jackson, 627 F.2d 1198, 1219 (D.C. Cir. 1980); United States v. Grassi, 616 F.2d 1295, 1300-01 (5th Cir.), *cert. denied*, 449 U.S. 956 (1980). For a further discussion of the two-pronged admissibility tests, see *infra* notes 60-71 and accompanying text.

51. *See, e.g.*, United States v. Petrozziello, 548 F.2d 20, 23 (1st Cir. 1977) (since admissibility must be determined by judge under rule 104(a), preponderance of evidence standard will be applied to preliminary determinations of conspiracy). For the text of rule 104, see *supra* note 40. For a further discussion of the preponderance of the evidence standard, see *infra* notes 55-59 and accompanying text.

52. Comment, *supra* note 27, at 593. The *prima facie* standard was applied by the judge before the evidence was submitted to the jury. *Id.* The jury was then commonly instructed to redetermine the admissibility of such statements. *Id.* *See, e.g.*, Carbo v. United States, 314 F.2d 718, 737 (9th Cir. 1963) (adopting the prevailing *prima facie* standard), *cert. denied*, 377 U.S. 953 (1964).

53. Garland & Snow, *supra* note 15, at 8. This is the same standard applied by a judge in ruling on a motion for a directed verdict. C. McCORMICK, *supra* note 46, § 339.

54. United States v. Dixon, 562 F.2d 1138, 1141 (9th Cir. 1977), *cert. denied*, 435 U.S. 927 (1978). In *Dixon*, the Ninth Circuit adopted a "substantial independent evidence" test. *Id.* The court went on, however, to state that its test would be satisfied by a *prima facie* showing of conspiracy. *Id.*

55. United States v. Gibbs, 739 F.2d 838, 843 (3rd Cir. 1984), *cert. denied*, 105 S. Ct. 779 (1985); United States v. Andrews, 585 F.2d 961, 965-66 (10th Cir. 1978); United States v. Santiago, 582 F.2d 1128, 1134-35 (7th Cir. 1978); United States v. Bell, 573 F.2d 1040, 1044 (8th Cir. 1978); United States v. Martorano, 557 F.2d 1, 11 (1st Cir. 1977); United States v. Stanchich, 550 F.2d 1294, 1297-99 & n.1 (2d Cir. 1977); United States v. Jones, 542 F.2d 186, 202-03 (4th Cir.), *cert. denied*, 426 U.S. 922 (1976). Several other circuits also employ the preponderance of the evidence standard to the second prong of a two-pronged admissibility test. *See* United States v. Bulman, 667 F.2d 1374, 1379 (11th Cir.), *cert. denied*, 456 U.S. 1010 (1982); United States v. Jackson, 627 F.2d 1198, 1219 (D.C. Cir. 1980); United States v. Grassi, 616 F.2d 1295, 1301 (5th Cir.), *cert. denied*, 449 U.S. 956 (1980). For a further discussion of the standards of proof under a two-pronged admissibility test, see *infra* notes 60-71 and accompanying text.

preponderance of the evidence standard requires a judge to weigh evidence offered by both parties and to determine whether existence of a conspiracy is more probable than not.⁵⁶ This standard was adopted by most circuits following the enactment of the Federal Rules of Evidence, because its weighing process was better suited to the decision-making authority delegated to judges under rule 104 than was the old *prima facie* standard.⁵⁷ The preponderance of the evidence test is a more stringent standard of proof and more difficult for a prosecutor to meet than the *prima facie* test.⁵⁸ Unlike the *prima facie* standard, however, the preponderance of the evidence test also places a burden upon the defendant by requiring him to produce rebuttal evidence sufficient to outweigh the prosecution's evidence.⁵⁹

The Fifth,⁶⁰ Tenth⁶¹ and District of Columbia⁶² Circuits currently apply a two-step admissibility test to coconspirator statements. Under the Fifth and Tenth Circuit formulations, a trial judge first must make a threshold determination that the offering party has introduced "substantial evidence" of a conspiracy.⁶³ The judge must make this determination before the jury is permitted to hear the contested out-of-court statement.⁶⁴ Substantial evidence under this formulation is interpreted

56. Garland & Snow, *supra* note 15, at 8.

57. Recent Development, *supra* note 21, at 628-29. The preponderance of evidence standard has been described as better suited to rule 104's purposes than the old *prima facie* standard for three reasons. First, under rule 104(a), a judge's determination of a preliminary question of admissibility is conclusive, therefore he should consider all the available evidence. *Id.* Second, rule 104 uses the word "determine," which imports a higher standard of proof than a mere finding of a *prima facie* case. *Id.* Third, some circuits allow a judge to consider hearsay and other inadmissible evidence in reaching his preliminary finding, thereby necessitating the higher standard of proof. *Id.*

58. United States v. Petrozziello, 548 F.2d 20, 23 (1st Cir. 1977) (changes in rules of evidence require adoption of higher standard than *prima facie* evidence). United States v. Trotter, 529 F.2d 806, 812 n.8 (3d Cir. 1976) ("requirement of *prima facie* proof is less stringent than that of preponderance of the evidence").

59. Garland & Snow, *supra* note 15, at 8.

60. United States v. James, 590 F.2d 575, 580-83 (5th Cir.) (creating two-part test and rejecting *prima facie* standard), *cert. denied*, 442 U.S. 917 (1979).

61. United States v. Petersen, 611 F.2d 1313, 1327-31 (10th Cir. 1979) (adopting Fifth Circuit's two-part test, rejecting preponderance of evidence test), *cert. denied*, 447 U.S. 905 (1980).

62. United States v. Jackson, 627 F.2d 1198, 1219-20 (D.C. Cir. 1980) (fashioning a two-part test).

63. United States v. James, 590 F.2d 575, 680-81 (5th Cir.) (standard of substantial independent evidence is merely threshold question, made before government has presented its case in full, and is more appropriate than standard requiring preponderance of evidence), *cert. denied*, 442 U.S. 917 (1979); United States v. Petersen, 611 F.2d 1313, 1330 (10th Cir. 1979) (substantial independent evidence standard applied "rather than one requiring, at the initial stages of the proceedings, a 'preponderance' of the evidence") (emphasis supplied by court), *cert. denied*, 447 U.S. 905 (1980).

64. United States v. James, 590 F.2d 575, 581 (5th Cir.) (trial court's

as a showing of a prima facie case—"at least enough evidence to take the question to a jury."⁶⁵ If the statement is admitted, then upon appropriate motion at the conclusion of all the evidence, the court must make a second determination that all the foundational elements of rule 801(d)(2)(E) have been established by a preponderance of the evidence.⁶⁶

The District of Columbia Circuit has formulated a slightly different two-step standard of proof.⁶⁷ Under the first step of the test, a trial judge must find that the existence of a conspiracy has been proved by substantial independent evidence.⁶⁸ Although the District of Columbia Circuit has not defined "substantial independent evidence," it has ruled that the first step of its test may be fulfilled by presentation of less evidence than would be necessary "to take the question to the jury."⁶⁹ At

threshold determination usually is to be made "during the presentation of the government's case in chief and before the evidence is heard by the jury"), *cert. denied*, 442 U.S. 917 (1979).

65. *United States v. James*, 590 F.2d 575, 580-81 (5th Cir.) (citing *United States v. Nixon*, 418 U.S. 683, 701 & n.14 (1974)), *cert. denied*, 442 U.S. 917 (1979). *See also* *United States v. Petersen*, 611 F.2d 1313, 1330 n.1 (10th Cir. 1979), *cert. denied*, 447 U.S. 905 (1980). In *Petersen*, the Tenth Circuit explained the substantial independent evidence test as requiring "such evidence as a reasonable mind would accept as adequate to support a conclusion" and "more than a scintilla." 611 F.2d at 1330 n.1. The court also stated that evidence would meet the test even if two inconsistent conclusions could be drawn from it. *Id.* For a further discussion of the prima facie standard, see *supra* notes 52-54 and accompanying text.

66. *United States v. James*, 590 F.2d 575, 582-83 (5th Cir.), *cert. denied*, 442 U.S. 917 (1979). In *James*, the Fifth Circuit stated:

[O]n appropriate motion at the conclusion of all the evidence the court must determine as a factual matter whether the prosecution has shown by a preponderance of the evidence independent of the statement itself (1) that a conspiracy existed, (2) that the coconspirator and the defendant against whom the coconspirator's statement is offered were members of the conspiracy, and (3) that the statement was made during the course and in furtherance of the conspiracy.

Id. at 582. If the offering party fails to meet this test at the close of the evidence, the statement must be withdrawn from evidence and may not be submitted to the jury. *Id.* at 582-83. The judge then must decide whether the prejudice arising from the erroneous admission requires the declaration of a mistrial, or whether it may be cured by a cautionary instruction to the jury. *Id.* *See also* *United States v. Petersen*, 611 F.2d 1313, 1330-31 (10th Cir. 1979) (adopting *James* test), *cert. denied*, 447 U.S. 905 (1980). For a further discussion of the preponderance of the evidence standard, see *supra* notes 55-59 and accompanying text.

67. *See* *United States v. Jackson*, 627 F.2d 1198, 1219 (D.C. Cir. 1980) (rejecting standards set by Fifth Circuit because they blur the "two discrete determinations" to be made by judge).

68. *Id.* Although the *Jackson* court adopted the same terminology as the Fifth Circuit, this court expressly refused to interpret "substantial independent evidence" in the same way the Fifth Circuit had. *Id.* at 1219-20.

69. *Id.* at 1219-29. The court explained that it believed the standard of proof "would seem to be easier than that required to persuade the judge that a reasonable juror could be convinced beyond a reasonable doubt." *Id.* at 1220.

the close of all the evidence, the trial judge must make a second determination of admissibility, considering all the evidence⁷⁰ and determining whether a reasonable juror could find the existence of a rule 801(d)(2)(E) conspiracy beyond a reasonable doubt.⁷¹

b. Role of the Judge and Jury

Prior to the enactment of the Federal Rules of Evidence, the judge and jury often shared the responsibility of deciding questions of admissibility under the coconspirator exception to the hearsay rule.⁷² Adoption of rule 104, however, has minimized the jury's role in deciding these questions.⁷³ While rule 104(b) gives the jury the responsibility of determining preliminary questions of relevance subject to conditions of fact,⁷⁴ rule 104(a) delegates authority to the judge to decide all prelimi-

Thus, the *Jackson* court's standard varies from the Fifth and Tenth Circuits' interpretation that "substantial independent evidence" means evidence which is sufficient to take the case to the jury. For a further discussion of the Fifth and Tenth Circuits' interpretation, see *supra* notes 63-66 and accompanying text.

70. *United States v. Jackson*, 627 F.2d 1198, 1219-20 (D.C. Cir. 1980). In making this second determination, the court held that a trial judge may consider all the evidence, including hearsay and potentially excludable coconspirators statements, to determine the existence of a conspiracy. *Id.* Under the tests formulated by the Fifth and Tenth Circuits, the trial judge can consider only evidence that is independent of the disputed statements. See *United States v. James*, 590 F.2d 575, 583 (5th Cir.), *cert. denied*, 442 U.S. 917 (1979); *United States v. Petersen*, 611 F.2d 1313, 1330-31 (10th Cir. 1979), *cert. denied*, 447 U.S. 905 (1980). For a further discussion of the requirement that the trial judge rely only upon independent evidence, see *infra* notes 97-116 and accompanying text.

71. *United States v. Jackson*, 627 F.2d 1198, 1219-20 (D.C. Cir. 1980) (quoting *Curley v. United States*, 160 F.2d 229, 232 (D.C. Cir.), *cert. denied*, 331 U.S. 837 (1947)). The District Columbia Circuit enunciated the standard as "whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt." *Id.* at 1219. The court also noted that this standard does not require as strong a determination as that made by a jury in determining whether a defendant is guilty of conspiracy. *Id.* at 1220.

72. See Note, *supra* note 27, at 128-31 (1982). Questions of admissibility were determined through a two-part process. *Id.* at 128. Before conditionally submitting coconspirator statements to a jury, a judge had to find that a prima facie case of conspiracy had been established. *Id.* at 1228-29. Once an unconditional determination of conspiracy had been made by the judge, the jury had to find the existence of a conspiracy beyond a reasonable doubt before considering the statements on the matter of guilt. See Recent Development, *supra* note 21, at 622-24. See also 1 J. WEINSTEIN & M. BERGER, *supra* note 27, ¶ 104(5). For a further discussion of the delegation of questions of admissibility to the judge and jury before adoption of the Federal Rules of Evidence, see *supra* note 39 and accompanying text.

73. See, e.g., *United States v. James*, 590 F.2d 575, 579 (5th Cir.) (rule 104 requires that preliminary questions under rule 801(d)(2)(E) be decided by judge, not by jury), *cert. denied*, 442 U.S. 917 (1979). For the text of rule 104, see *supra* note 40.

74. FED. R. EVID. 104(b) advisory committee note. See also *United States v. James*, 590 F.2d 575, 579 (5th Cir.) (jury decides preliminary questions of fact

nary questions of competence of evidence.⁷⁵ Unfortunately, neither rule 104 nor rule 801(d)(2)(E) provide any indication of whether proof of conspiracy under rule 801(d)(2)(E) is to be treated as a question of admissibility under rule 104(a) or a question of conditional relevance under rule 104(b).⁷⁶ While the question logically could fall within either of the two categories,⁷⁷ all of the federal circuits presently require that the judge alone make preliminary factual determinations under rule 801(d)(2)(E).⁷⁸

In considering the problems presented by ruling on the admissibility of coconspirator statements, the courts have been particularly sensitive to the danger of prejudice when the question is left to the jury.⁷⁹

upon whose existence the relevancy of particular evidence is conditioned), *cert. denied*, 442 U.S. 917 (1979). Questions of "conditional relevancy" are generally submitted to the jury in deference to its role as the trier of fact. FED. R. EVID. 104(b) advisory committee note. The judge makes a preliminary determination of admissibility, i.e., whether the foundation evidence to be offered will be sufficient to support a finding of fulfillment of the "condition." If so, the disputed item of evidence is admitted. After the submission of all foundation evidence bearing on the existence of the fact upon which relevancy is conditioned, the jury decides the issue, so long as the judge determines that the jury could reasonably conclude that the fact did not exist. *Id.* See also *United States v. Enright*, 579 F.2d 980, 984 (6th Cir. 1978) (foundational provisions under rule 801(d)(2)(E) could be couched in terms of conditional relevancy).

75. FED. R. EVID. 104(a). See *United States v. Enright*, 579 F.2d 980, 984 (6th Cir. 1978) (rule 104(a) requires questions of competence to be decided by judge alone). According to the Sixth Circuit in *Enright*, the competence of a coconspirator's statement is measured by asking "whether the conspiracy and the defendant's participation in it render the hearsay declarations sufficiently reliable to merit admission." *Id.*

76. *United States v. James*, 590 F.2d 575, 579 (5th Cir.) (neither rule 104 nor Advisory Committee's notes specifically address admissibility of coconspirator statements), *cert. denied*, 442 U.S. 917 (1979); *United States v. Enright*, 579 F.2d 980, 984 (6th Cir. 1978) (it is unclear whether rule 104(a) or rule 104(b) covers the admissibility of coconspirator statements).

77. See *United States v. Enright*, 579 F.2d 980, 984 (6th Cir. 1978) (discussing opposing arguments as to whether rule 104(a) or rule 104(b) controls preliminary questions of proof of conspiracy).

78. *United States v. Mastropieri*, 685 F.2d 776, 787-89 (2d Cir.), *cert. denied*, 459 U.S. 945 (1982); *United States v. Hartley*, 678 F.2d 961, 973-74 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); *United States v. Federico*, 658 F.2d 1337, 1342 n.6 (9th Cir. 1981); *United States v. Jackson*, 627 F.2d 1198, 1217-18 (D.C. Cir. 1980); *United States v. James*, 590 F.2d 575, 579 (5th Cir.), *cert. denied*, 442 U.S. 917 (1979); *United States v. Andrews*, 585 F.2d 961, 965 (10th Cir. 1978); *United States v. Santiago*, 582 F.2d 1128, 1133 (7th Cir. 1978); *United States v. Enright*, 579 F.2d 980, 984 (6th Cir. 1978); *United States v. Bell*, 573 F.2d 1040, 1043 (8th Cir. 1978); *United States v. Petrozziello*, 548 F.2d 20, 22 (1st Cir. 1977); *United States v. Trowery*, 542 F.2d 623, 626-27 (3d Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977); *United States v. Jones*, 542 F.2d 186, 203 (4th Cir.), *cert. denied*, 426 U.S. 922 (1976).

79. See, e.g., *United States v. James*, 590 F.2d 575, 579 (5th Cir.), *cert. denied*, 442 U.S. 917 (1979). In *James*, the court held that the admissibility of a coconspirator's statement is a question for the judge. *Id.* The court stated that coconspirator statements endanger "the integrity of the trial because the relevancy

Even when the preliminary determination of conspiracy is delegated to the judge, however, the possibility of jury prejudice still poses problems.⁸⁰ One such problem is related to the timing and order of proof employed by a trial judge in ruling on the admissibility of coconspirator statements. A trial judge may conditionally admit a coconspirator's statements early in a trial subject to the stipulation that the offering party later "connect them up,"⁸¹ or, the judge may withhold an admissibility ruling until the foundational requirements of rule 801(d)(2)(E) are met.⁸² Although jury confusion may result when the prosecution is not allowed to present its evidence in the most logical order,⁸³ an even greater danger of prejudice is presented when a jury is allowed to consider evidence which is later held to be inadmissible.⁸⁴ If inadmissible evidence has been conditionally admitted during trial, the judge will have to weigh its prejudicial effect and determine whether a limiting instruction to the jury or a declaration of mistrial would be the appropriate remedy.⁸⁵ In either case there is a danger that the jury's

and apparent probative value of the statements may be so highly prejudicial as to color other evidence even in the mind of a conscientious juror, despite instructions to disregard the statements or to consider them conditionally." *Id.*

80. See generally 1 J. WEINSTEIN & M. BERGER, *supra* note 27, ¶ 104[5] at 104-47 to -52, 104-57 to -58; Recent Development, *supra* note 21, at 622-24, 633-34.

81. *United States v. Macklin*, 573 F.2d 1046, 1049 n.3 (8th Cir.) (coconspirator's statement admitted under condition that it be later shown by sufficient independent evidence that conspiracy existed), *cert. denied*, 439 U.S. 852 (1978); *United States v. Stanchich*, 550 F.2d 1294, 1297-98 (2d Cir. 1977) (judge may admit coconspirator statements "subject to connections").

82. *United States v. James*, 590 F.2d 575, 581-82 (5th Cir.) (whenever practicable, trial judge should require requisite showing of conspiracy and defendants' connection thereto before allowing coconspirator statements to be introduced into evidence), *cert. denied*, 442 U.S. 917 (1979).

83. *United States v. Ricks*, 639 F.2d 1305, 1309 (5th Cir. 1981) (pretrial admissibility hearing will result in a less "clumsy" order of proof). *But see United States v. Legoto*, 682 F.2d 180 (8th Cir.) (no prejudice where, instead of ruling at close of all the evidence, and out of jury's presence, admissibility ruling was made at close of Government's evidence, and in front of jury), *cert. denied*, 459 U.S. 1091 (1982). See generally 1 J. WEINSTEIN & M. BERGER, *supra* note 27, ¶ 104[105], at 104-52 (delay in making admissibility determination will inhibit the government in laying out its case in the most desirable order).

84. See, e.g., *United States v. James*, 590 F.2d 575, 581-82 (5th Cir.) (when coconspirator statement is conditionally admitted and never connected up, conspirator will have been prejudiced from jury's having heard inadmissible evidence), *cert. denied*, 442 U.S. 917 (1979).

85. See 590 F.2d at 582. See also *United States v. Bell*, 573 F.2d 1040, 1044 (8th Cir. 1978) (if offering party fails to meet burden of establishing conspiracy by preponderance of the evidence once coconspirator's statement has been admitted, the court will declare mistrial upon appropriate motion, unless cautionary instruction will suffice to cure the prejudice); *United States v. Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969) (when offering party has not "connected up" coconspirator's statement, judge shall "instruct the jury to disregard the hearsay or, when this was so large a proportion of the proof as to render a cautionary instruction of doubtful utility . . . , declare a mistrial if the defendant asks for it"), *cert. denied*, 397 U.S. 1028 (1970).

decision-making process will be adversely affected. In order to minimize these dangers and facilitate the practical realities of a conspiracy trial, timing and order of proof generally have been left to the discretion of the trial judge,⁸⁶ although several circuits have endorsed "preferred" orders of proof.⁸⁷

A second problem relates to the nature of instructions to be given when coconspirator statements are submitted to a jury for consideration. Prior to the enactment of the Federal Rules of Evidence, when a coconspirator's statement was submitted to a jury, the jury was instructed to determine the admissibility of the statement before considering it as probative evidence of guilt.⁸⁸ Since rule 104 now places the admissibility determination in the hands of the judge, such an instruction is no longer necessary, and may confuse the jury.⁸⁹ Several circuits have held that the jury should no longer be instructed regarding the admissibility of a coconspirator's statement.⁹⁰ However, the giving of such instructions seldom results in reversible error, since the instruc-

86. See, e.g., *United States v. Kaatz*, 705 F.2d 1237, 1244 (10th Cir. 1983) (order of proof of elements of rule 801(d)(2)(E) is within discretion of trial judge).

87. The Fifth Circuit, for example, has recommended that trial courts require a showing of conspiracy and a connection to the defendant before admitting coconspirator statements into evidence. *United States v. James*, 590 F.2d 575, 581-82 (5th Cir.), *cert. denied*, 442 U.S. 917 (1979). The Tenth and Eleventh Circuits have adopted the same preference. *United States v. Alvarez*, 696 F.2d 1307, 1310 (11th Cir.), *cert. denied*, 461 U.S. 907 (1983); *United States v. Behrens*, 689 F.2d 154, 158 (10th Cir.), *cert. denied*, 459 U.S. 1088 (1982). The Eighth Circuit will conditionally admit the out-of-court declaration of a coconspirator, but it also requires an explicit finding by the trial judge, at the conclusion of all the evidence, that a conspiracy has been proved by a preponderance of the evidence. If the court determines that the offering party has not met this burden, it will declare a mistrial unless cautionary jury instructions would be sufficient to cure any prejudice. *United States v. Bell*, 573 F.2d 1040, 1044 (8th Cir. 1978). *But cf.* *United States v. Morton*, 591 F.2d 483, 484-85 (8th Cir.) (failure of trial court to make explicit finding constitutes harmless error when record shows preponderance of evidence and defense counsel failed to object), *cert. denied*, 441 U.S. 950 (1979). The First Circuit has adopted a minimally modified version of the preference articulated by the Eighth Circuit in *Bell*. See *United States v. Ciampaglia*, 628 F.2d 632, 638 (1st Cir.), *cert. denied*, 449 U.S. 956 (1980).

88. See, e.g., *Myers v. United States*, 377 F.2d 412, 417 (5th Cir. 1967) (jury may consider coconspirator's statement if it first finds independent evidence that conspiracy existed and that statement was made both during course and in furtherance of the conspiracy), *cert. denied*, 390 U.S. 929 (1968). For an example of a model jury instruction on the admissibility of coconspirators' statements, see *supra* note 39.

89. *United States v. Enright*, 579 F.2d 980, 987 (6th Cir. 1978) (pointing out that there is no longer a need for jury instructions that are "potentially confusing and internally inconsistent").

90. See, e.g., *United States v. Santiago*, 582 F.2d 1128, 1136 (7th Cir. 1978) (there is no longer any need to give traditional jury instructions on admissibility); *United States v. Enright*, 579 F.2d 980, 987 (6th Cir. 1978) (disapproving use of "confusing" jury instructions).

tions constitute a windfall for the defendant.⁹¹ To reduce the possibility of confusion, the Eighth Circuit has recommended that the jury be cautioned regarding the credibility of coconspirator statements, but that the jury not be charged on the admissibility of such statements.⁹²

In cases in which a jury must decide whether a defendant is guilty of the substantive crime of conspiracy, a potential problem is raised by the interplay between rule 104(a) and the right to trial by jury guaranteed by the sixth amendment.⁹³ The sixth amendment requires that all factual questions relating to guilt or innocence be determined by a jury.⁹⁴ Preliminary questions of admissibility traditionally have been excluded from this requirement, however, as they do not relate directly to guilt or innocence.⁹⁵ Although the courts have not addressed the issue, at least one commentator has argued that the threshold question of conspiracy under rule 801(d)(2)(E) is sufficiently similar to a substantive finding of criminal conspiracy to warrant its submission to the jury, in accordance with the sixth amendment.⁹⁶

91. See, e.g., *United States v. Nickerson*, 606 F.2d 156, 158 (6th Cir.), *cert. denied*, 444 U.S. 994 (1979); *United States v. Petrozziello*, 548 F.2d 20, 22-23 (1st Cir. 1977) (although added layer of fact finding is unnecessary when jury is instructed to determine admissibility of coconspirator's statement, it seldom prejudices defendant).

92. *United States v. Bell*, 573 F.2d 1040, 1044 (8th Cir. 1978). See also *United States v. Whitley*, 670 F.2d 617, 620-21 (5th Cir. 1982) (judge should first determine admissibility of statements, then jury should determine weight and credibility).

93. The sixth amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." U.S. CONST. amend. VI. For a general discussion of the potential violation of a criminal defendant's sixth amendment right to trial by jury when preliminary questions are decided by a judge, see Garland & Snow, *supra* note 15, at 12-14 (1972); Recent Development, *supra* note 21, at 627-28.

94. *Lego v. Twomey*, 404 U.S. 477, 486-87 (1977) (accused is entitled to a finding of proof beyond a reasonable doubt of every fact necessary to establish the crime with which he is charged) (citing *In re Winship*, 397 U.S. 353, 364 (1970)); *United States v. Hayward*, 420 F.2d 142, 144 (D.C. Cir. 1969) (it is implicit in sixth amendment that in criminal cases the "jury [must] decide all relevant issues of fact and . . . weigh the credibility of the witnesses").

95. *Lego v. Twomey*, 404 U.S. 477, 489-90 (1972) (normal rule is that "admissibility of evidence is a question for the court rather than the jury").

96. See Recent Development, *supra* note 21, at 627-28. This commentator has argued that a trial judge's threshold determination that a conspiracy exists for purposes of rule 801(d)(2)(E) is analogous to the ultimate question of guilt or innocence when conspiracy has been charged. *Id.* He concluded that it is irrelevant that a lower standard of proof is used or that the question is merely one of admissibility, because the judge's determination that a conspiracy existed necessarily influences the jury. *Id.* But see *United States v. Legato*, 682 F.2d 180, 183 (8th Cir.) (in making determinations that conspiracy existed for purposes of rule 801(d)(2)(E), judge's ruling in front of jury that defendants were "working together," accompanied by cautionary instructions, did not prejudice defendants, even though jury had previously been instructed that it would determine existence of conspiracy), *cert. denied*, 459 U.S. 1091 (1982). See also Garland & Snow, *supra* note 15, at 12-14 (sixth amendment does not preclude judge from

c. Requirement of Independent Evidence

One of the most controversial questions generated by the adoption of rule 801(d)(2)(E) is whether the foundational evidence required before a statement is admissible under the rule can consist of alleged coconspirators' statements.⁹⁷ Prior to the enactment of the Federal Rules of Evidence, federal courts uniformly held that the admissibility of coconspirators' statements could not be founded on the statements themselves.⁹⁸ In *Glasser v. United States*,⁹⁹ the United States Supreme Court ruled that coconspirators' statements only could be admitted into evidence if they were supported by proof of conspiracy independent of the statements themselves.¹⁰⁰ The Court expressed fear that any other interpretation would permit bootstrapping of hearsay evidence.¹⁰¹

Nothing in the Federal Rules of Evidence expressly states that coconspirators' statements cannot be used to establish the foundational elements of rule 801(d)(2)(E).¹⁰² Rule 104(a) states that preliminary questions of admissibility generally are to be determined without regard to the rules of evidence.¹⁰³ In *United States v. Martorano*,¹⁰⁴ the First Circuit concluded that the Federal Rules of Evidence overruled *Glasser*

making preliminary factual determination of admissibility of coconspirator's statement). For a discussion of the difference between conspiracy as a substantive crime and as an element of rule 801(d)(2)(E), see *supra* notes 34-37 and accompanying text.

97. For a general discussion of the requirement that the admissibility of coconspirators' statements be based on evidence independent of the statements themselves, see D. LOUISELL & C. MUELLER, *supra* note 17, § 411; S. SALTZBURG & K. REDDEN, *supra* note 17, at 503-09, 537-42; 4 J. WEINSTEIN & M. BERGER, *supra* note 27, Note, *supra* note 27, at 134-37; Recent Development, *supra* note 21, at 629-31.

98. Bergman, *The Conspirators' Exception: Defining the Standard of the Independent Evidence Test Under the New Federal Rules of Evidence*, 5 HOFSTRA L. REV. 99, 100-101 (1976).

99. 315 U.S. 60 (1942).

100. *Id.* at 74-75. The *Glasser* Court required a showing of "proof *aliunde*" that a conspiracy existed before a coconspirator's statements could be admitted. *Id.* The Court came to a similar conclusion in *United States v. Nixon*, where it required proof of the conspiracy by "substantial independent evidence." 418 U.S. 683, 701 & n.14 (1974) (emphasis added).

101. 315 U.S. at 75. The *Glasser* Court stated that coconspirator statements must be supported by independent proof of conspiracy, "[o]therwise, hearsay would lift itself by its own bootstraps to the level of competent evidence." *Id.*

102. *United States v. James*, 590 F.2d 575, 581 (5th Cir.) (literal reading of rule 801(d)(2)(E) and rule 104(a) discloses no requirement of independent proof of conspiracy but the requirement may be implied from prior case law), *cert. denied*, 442 U.S. 917 (1979). For the test of rule 801(d)(2)(E), see *supra* note 21. For the text of rule 104(a), see *supra* note 40.

103. FED. R. EVID. 104(a). When rule 104(a) was enacted, it was contemplated that the admissibility of an item of evidence may require consideration of the item itself. *Id.* advisory committee note. Exercise of this view, however, is limited to cases in which "practical necessity" requires its application. *Id.* For example, in determining the admissibility of a declaration against interest, the declaration itself must be considered, and in determining the competency of a

and allowed the trial judge to base his preliminary finding of conspiracy for purposes of rule 801(d)(2)(E) on the statements sought to be admitted.¹⁰⁵ The *Martorano* court reasoned that proof by independent evidence no longer was a precondition to the admission of a coconspirator's statement because rule 104(a) permitted a trial judge to consider hearsay and other inadmissible evidence in making preliminary determinations.¹⁰⁶ Thus far, the Sixth Circuit is the only other circuit to have adopted this position.¹⁰⁷

The remaining circuits have adhered to *Glasser's* prohibition against bootstrapping.¹⁰⁸ Some courts have reached this conclusion without addressing the impact of rule 104(a),¹⁰⁹ while others have followed the

witness to testify, particularly a small child, the witness' testimony must be considered. *Id.*

104. 557 F.2d 1 (1st Cir. 1977), *cert. denied*, 435 U.S. 922 (1978).

105. *Id.* at 11-12. In *Martorano*, the First Circuit stated:

We are aware that *United States v. Glasser* rejected the view that the existence of a conspiracy could be proved by the very statement seeking admission. The new rules, however, explicitly contemplate the consideration of such hearsay evidence in making preliminary findings of fact. We believe the new rules must be taken as overruling *Glasser* to the extent that it held that the statement seeking admission cannot be considered at all in making the determination whether a conspiracy exists.

Id. at 12 (citations omitted). The *Martorano* court went on, however, to caution trial courts about the unreliability of bootstrapped evidence:

Glasser . . . still stands as a warning to trial judges that such statements should ordinarily be given little weight. Here, where there is significant independent evidence of the existence of a conspiracy and where the statement seeking admission simply corroborates inferences which can be drawn from the independent evidence, we see no problem with the consideration of that statement.

Id.

106. *Id.* at 11.

107. *United States v. Vinson*, 606 F.2d 149, 153 & n.8 (6th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980). In *Vinson*, the Sixth Circuit recognized the split of authority over the requirement of independent evidence of conspiracy, but went on to conclude that rule 104(a) "modifies prior law to the contrary," allowing a judge to consider the hearsay statements themselves to decide preliminary questions of admissibility. *Id.* In order to avoid prejudice, the *Vinson* court stated that "the judge should refrain from advising the jury of his findings." *Id.* at 153.

108. See *United States v. Terry*, 702 F.2d 299, 320 (2d Cir.), *cert. denied*, 461 U.S. 931 (1983); *United States v. Tunsil*, 672 F.2d 879, 881-82 (11th Cir.), *cert. denied*, 459 U.S. 850 (1982); *United States v. Cawley*, 630 F.2d 1345, 1350 (9th Cir. 1980); *United States v. Truong Dinh Hung*, 629 F.2d 908, 930 (4th Cir. 1980), *cert. denied*, 454 U.S. 1144 (1982); *United States v. Petersen*, 611 F.2d 1313, 1330 (10th Cir. 1979), *cert. denied*, 447 U.S. 833 (1979); *United States v. McPartlin*, 595 F.2d 1321, 1357 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979); *United States v. James*, 590 F.2d 575, 581 (5th Cir.), *cert. denied*, 442 U.S. 917 (1979); *United States v. Macklin*, 573 F.2d 1046, 1048 & n.2 (8th Cir.), *cert. denied*, 439 U.S. 852 (1978); *United States v. Trowery*, 542 F.2d 623, 627 (3d Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977).

109. See, e.g., *United States v. Trowery*, 542 F.2d 623, 626-27 (3d Cir. 1976) (citing *Glasser* for the proposition that independent evidence must be used to prove conspiracy under rule 801(d)(2)(E)), *cert. denied*, 429 U.S. 1104 (1977).

lead of the Eighth Circuit in *United States v. Macklin*,¹¹⁰ and expressly rejected the First Circuit's holding in *Martorano*.¹¹¹ In *Macklin*, the Eighth Circuit concluded that bootstrapping of coconspirators' statements was not contemplated by the drafters of rule 104(a), and that independent evidence was still necessary to prove conspiracy under rule 801(d)(2)(E).¹¹² Still other circuits have handled the problem by attempting to harmonize rule 104(a) with *Glasser*.¹¹³ These circuits have reasoned that although rule 104(a) permits the judge to consider hearsay statements and other inadmissible evidence in making a preliminary determination of conspiracy,¹¹⁴ the rule cannot be interpreted to permit consideration of the very statements that are sought to be admitted.¹¹⁵ At least one commentator has asserted that these circuits have refused to reject *Glasser* because its requirement of independent evidence provides a valuable safeguard to the reliability of coconspirators' statements.¹¹⁶

2. *During the Course of the Conspiracy*

Once the existence of a conspiracy has been established, an offering party must demonstrate that the statements offered were made "during the course" of the conspiracy.¹¹⁷ This requirement of pendency has been expressly incorporated into rule 801(d)(2)(E) as a codification of the common law of evidence.¹¹⁸ The pendency requirement has been

110. 573 F.2d 1046 (8th Cir.), *cert. denied*, 439 U.S. 852 (1978).

111. 573 F.2d at 1048 n.2. *See also* *United States v. Papia*, 560 F.2d 827, 835 (7th Cir. 1977).

112. 573 F.2d at 1048 n.2.

113. *See* *United States v. James*, 590 F.2d 575, 581 (5th Cir.) (if construed to require evidence independent of the conspirator's statement whose admissibility is at issue, rule 104(a) comports with *Glasser* and *Nixon*), *cert. denied*, 442 U.S. 917 (1979). *Accord* *United States v. Valencia*, 609 F.2d 603, 635 n.24 (2d Cir. 1979) (independent evidence used to make preliminary determination of admissibility under rule 801(d)(2)(E) does not include hearsay statements which otherwise would be admissible only as coconspirator statements, but does include hearsay statements which would be admissible under other provisions of the Federal Rules), *cert. denied*, 446 U.S. 940 (1980); *United States v. Roe*, 670 F.2d 956, 963 (11th Cir. 1982) (statements by conspirators which constitute party admission under rule 801(d)(2)(A) are admissible as independent evidence to prove conspiracy under rule 801(d)(2)(E)), *cert. denied*, 459 U.S. 856 (1982).

114. *See* *United States v. James*, 590 F.2d 575, 581 (5th Cir.), *cert. denied*, 442 U.S. 917 (1979).

115. 590 F.2d at 581.

116. Recent Development, *supra* note 21, at 631 ("in the majority of circuits, then, the *Glasser* doctrine survives under Rule 104 because courts view it as providing an important safeguard against unreliability").

117. FED. R. EVID. 801(d)(2)(E). *See also* *United States v. Nixon*, 418 U.S. 683, 701 (1974); *Krulewitch v. United States*, 336 U.S. 440, 442-43 (1949); *United States v. Ammar*, 714 F.2d 238, 245 (3d Cir.), *cert. denied*, 464 U.S. 936 (1983).

118. FED. R. EVID. 801(d)(2)(E) advisory committee note. The Advisory Committee noted that "[t]he limitation upon the admissibility of statements of

viewed as providing safeguards of reliability,¹¹⁹ because the declarant's recollection and sincerity are enhanced by limiting application of rule 801(d)(2)(E) to statements that are made during the life of the conspiracy.¹²⁰ In application, however, "the life of the conspiracy" has been construed broadly.¹²¹

A conspiracy generally has been interpreted to begin at the time an illegal agreement is entered into, and to continue until the agreement is completely executed or terminated in some other way.¹²² It is irrelevant that the statements were made prior to the cut-off date of the statute of limitations or at a time when the agreement was not yet illegal.¹²³

While statements made after the termination of a conspiracy are not admissible as coconspirator statements,¹²⁴ it often is difficult to determine when a conspiracy has ended.¹²⁵ Generally, a conspiracy contin-

coconspirators to those made 'during the course . . . of the conspiracy' is in the accepted pattern." *Id.* The requirement that only statements made "during the course" of a conspiracy are admissible has long been the rule among federal courts. *See* *United States v. Gooding*, 25 U.S. (12 Wheat.) 460, 469-70 (1827).

119. Davenport, *supra* note 21, at 1385-87. The requirement of pendency has been seen as an assurance of the declarant's sincerity because his interests will be similar to those of the other conspirators while the goal of the conspiracy is unfulfilled. *Id.* at 1386. The requirement also is viewed as improving the declarant's recollection, because the events occurring during the pendency will be highlighted in his memory. *Id.* In practice, however, the pendency requirement probably has little qualitative effect on the reliability of coconspirator statements, according to one commentator. *Id.* at 1386-87.

120. *Id.* at 1387-88.

121. 4 J. WEINSTEIN & M. BERGER, *supra* note 27, ¶ 801(d)(2)(E)[01]. One common problem of conspiracy law is determining when a conspiracy began and ended, since there is usually no formal agreement susceptible to proof. *Id.* at 801-247 to -249. *See also* Levie, *supra* note 2, at 1173-74. Levie has noted, "So great is the hunger for evidence of conspiracy that some courts even admit declarations made prior to the illegal contract against all subsequent conspirators. And the definition of when the conspiracy terminates is difficult and easily manipulated to admit late admissions." *Id.* at 1173.

122. *See* J. WEINSTEIN & M. BERGER, *supra* note 27, ¶ 801(d)(2)(E)[01], at 801-245 to -249.

123. *United States v. Dennis*, 183 F.2d 201, 231-32 (2d Cir. 1950) (there is no logical reason to limit relevant evidence of a conspiracy to the period charged or only to the period when the agreement had become a crime), *aff'd* 341 U.S. 494 (1951).

124. *Lutwak v. United States*, 344 U.S. 604, 615-20 (1953) (declarations of a conspirator do not bind coconspirators if made after the conspiracy has ended); *United States v. Astorga-Torres*, 682 F.2d 1331, 1336 (9th Cir.) (instruction that jury could consider a coconspirator's statement made prior to the conspiracy was error, but held to be harmless), *cert. denied*, 459 U.S. 1040 (1982).

125. *See* 4 D. LOUISELL & C. MUELLER, *supra* note 17, § 427, at 338. Louisell and Mueller have noted:

Conspiracy does not end like a football game, at a moment which can be fixed with precision, and statements made during what can only be viewed as the last possible minutes of pursuit of the main objective have been held to be 'during' the conspiracy, including those made upon apprehension by law enforcement officers but just before actual arrest.

Id.

ues until its goals have been accomplished, abandoned, or terminated by some other act.¹²⁶ Thus, it is the scope of the conspiratorial agreement that is the crucial consideration, as the agreement determines the duration of the conspiracy.¹²⁷ The life of a conspiracy does not extend into the period of its concealment,¹²⁸ unless the concealment is an affirmative goal of the conspiracy¹²⁹ or an inevitable result of the crime committed.¹³⁰ If the goal of a conspiracy includes distribution of proceeds, the conspiracy does not terminate until the distribution is made.¹³¹

An individual conspirator may be held accountable under rule 801(d)(2)(E) for statements made when he was not a member of the conspiracy.¹³² A conspirator joining a conspiracy after its commencement usually is held accountable for all coconspirators' statements occurring before his membership.¹³³ In addition, statements made by coconspira-

126. *Fishwick v. United States*, 329 U.S. 211, 216 (1946) (a conspiracy continues as long as there is "continuity of action to produce the unlawful result," but the continuance of the result itself does not mean the conspiracy continues); *United States v. Rucker*, 586 F.2d 899, 906 (2d Cir. 1978) ("Once a conspiracy is shown to exist, which in its nature is not ended merely by lapse of time, it continues to exist until consummated, abandoned or otherwise terminated by some affirmative act."). Although statements made after the termination of a conspiracy are not admissible into evidence under rule 801(d)(2)(E), acts which shed light on the existence of a conspiracy are admissible even if they occur after the conspiracy's termination. *Anderson v. United States*, 417 U.S. 211, 219 (1974). For a discussion of statements that may constitute verbal acts, see *supra* note 21.

For a general discussion of events that may terminate a conspiracy, see C. MCCORMICK, *supra* note 46, § 267.

127. *Grunewald v. United States*, 353 U.S. 391, 405 (1957).

128. *Dutton v. Evans*, 400 U.S. 74, 81 (1970) (it is settled federal law that coconspirators' statements made during concealment phase of conspiracy are not made "during the course of the conspiracy"); *Grunewald v. United States*, 353 U.S. 391, 406 (1957) (where no agreement to conceal conspiracy can be shown or implied, conspiracy is deemed not to continue in existence during concealment period).

129. *United States v. Mackey*, 571 F.2d 376, 383 (7th Cir. 1978) (evidence was sufficient for jury to find agreement to conceal from outset of conspiracy).

130. *United States v. Diez*, 515 F.2d 892, 897-98 (5th Cir. 1975) (because crime of defrauding Internal Revenue Service by filing false returns ran inherent risk of discovery through audit, concealment was inevitable goal of conspiracy), *cert. denied*, 423 U.S. 1052 (1976).

131. *United States v. Xheka*, 704 F.2d 974, 985-86 (7th Cir.) (when conspiracy anticipates collection of proceeds from insurance company following fire, conspiracy is not terminated until proceeds are collected), *cert. denied*, 464 U.S. 993 (1983); *United States v. Knuckles*, 581 F.2d 305, 313 (2d Cir.) ("[W]here a general objective of the conspirators is money, the conspiracy does not end, of necessity, before the spoils are divided among the miscreants."), *cert. denied*, 439 U.S. 986 (1978).

132. 4 J. WEINSTEIN & M. BERGER, *supra* note 27, ¶ 801(d)(2)(E)[01], at 801-250 to -251; 4 D. LOUISELL & C. MUELLER, *supra* note 17, § 427, at 340-47.

133. *United States v. United States Gypsum Co.*, 333 U.S. 364, 393 (1948) (once conspiracy is established, "the declarations and acts of the various members even though made or done prior to the adherence of some to the conspiracy, become admissible against all as declarations or acts of coconspirators in aid of the conspiracy"). The rationale for this policy is that a new recruit arguably

tors in furtherance of an original plan are admissible against an individual conspirator who has left the conspiracy,¹³⁴ unless that individual has affirmatively withdrawn.¹³⁵ Statements made by a coconspirator after he has left a conspiracy, however, are not admissible against the remaining members of the conspiracy.¹³⁶

3. *In Furtherance of the Conspiracy*

The final foundational requirement of rule 801(d)(2)(E) is that statements sought to be introduced into evidence must have been made in furtherance of the proven conspiracy.¹³⁷ Of the three foundational requirements, this is the easiest to meet,¹³⁸ and the one affording the least protection to alleged conspirators.¹³⁹ The federal courts have read the requirement liberally,¹⁴⁰ interpreting it to encompass such evidence

can be thought to have joined the conspiracy with an implied adoption of prior proceedings. 4 J. WEINSTEIN & M. BERGER, *supra* note 27, ¶ 801(d)(2)(E)[01], at 801-250 to -251.

134. *United States v. Badolato*, 710 F.2d 1509, 1512-13 (11th Cir. 1983) (statements made by coconspirator in furtherance of conspiracy admissible against conspirators who were in jail when statements were made).

135. *United States v. Killian*, 639 F.2d 206, 209 (5th Cir.) ("a member of a conspiracy continues to be responsible for acts committed by coconspirators even after the former's arrest unless he has withdrawn from the conspiracy"), *cert. denied*, 451 U.S. 1021 (1981); *United States v. Mardian*, 546 F.2d 973, 978 n.5 (D.C. Cir. 1976) (coconspirators' statements uttered after date of withdrawal not admissible against withdrawing party). Withdrawal from a conspiracy will not be recognized unless the former conspirator has "acted affirmatively to defeat or disavow the purpose of the conspiracy." *Killian*, 639 F.2d at 209.

136. *Wong Sun v. United States*, 371 U.S. 471, 490 (1963) (out-of-court statement made after declarant's arrest may not be used against declarant's co-conspirators). Statements made by conspirators after apprehension are deemed to be particularly untrustworthy. *Davenport*, *supra* note 21, at 1386. Once a conspirator is apprehended he is likely to seek immunity or a reduced sentence by cooperating with the police, and the danger that he will inaccurately characterize the crime and misrepresent the activities of the participants in the conspiracy in order to better his position increases. *Id.* Even if post-conspiracy statements are not admissible under rule 801(d)(2)(E), however, they may be admissible as statements against penal interest under rule 804(b)(3). *See generally* Note, *Inculpatory Declarations Against Penal Interest and the Coconspirator Rule Under the Federal Rules of Evidence*, 56 IND. L.J. 151 (1980).

137. FED. R. EVID. 801(d)(2)(E). *See United States v. Nixon*, 418 U.S. 683, 701 (1974); *Anderson v. United States*, 417 U.S. 211, 218-19 (1974).

138. 4 D. LOUISELL & C. MUELLER, *supra* note 17, § 427, at 248. These commentators assert that the "in furtherance" requirement has not proved to be a significant obstacle to admissibility. *Id.*

139. *Davenport*, *supra* note 21, at 1387-88. "Many statements actually in furtherance of an alleged conspiracy will be quite unreliable in whole or in part." *Id.* at 1387. However, the "in furtherance" requirement will prevent certain types of unreliable statements such as "bragging by the declarant to his friends" and "squealing to the police out of fear of imminent apprehension." *Id.* For a further discussion of unreliable statements excluded under the "in furtherance" rule, see *infra* notes 148-52 and accompanying text.

140. *See, e.g., United States v. James*, 510 F.2d 546, 549 (5th Cir.), *cert. denied*, 423 U.S. 855 (1975). In *James*, the Fifth Circuit stated that "in order to be

as declarations of future intent,¹⁴¹ statements unwittingly made to law enforcement officials,¹⁴² and written records and nautical charts.¹⁴³ Although there have been efforts to eliminate the requirement,¹⁴⁴ it has been repeatedly endorsed by the Supreme Court¹⁴⁵ and expressly incorporated into rule 801(d)(2)(E).¹⁴⁶

To prove that a statement has been made in furtherance of a conspiracy it need be shown only that the statement was intended to ad-

missible against one not present when the statement was made, it must have been made 'in furtherance of the conspiracy.' Although this phrase has a talismanic ring to it, we must not apply the standard too strictly, lest we defeat the purpose of the exception." *Id.* One commentator has criticized the "in furtherance" rule as a mere extension of the scope of employment doctrine of agency law, slightly modified, and liberally applied by courts. Levie, *supra* note 2, at 1161, 1167-68. But see *Krulewitch v. United States*, 336 U.S. 440, 443-44 (1949) ("in furtherance" requirement has been "scrupulously observed by federal courts"). For a general discussion of the types of statements held to be in furtherance of a conspiracy, see 4 J. WEINSTEIN & M. BERGER, *supra* note 27, ¶ 801(d)(2)(E)[01], at 801-236 to -244; 4 D. LOUISELL & C. MUELLER, *supra* note 17, § 427, at 349-356.

141. *United States v. Miller*, 664 F.2d 94, 98-99 (5th Cir. 1981) (statement by declarant that he later intended to sell false motor vehicle titles to three unnamed truckdrivers held to be made in furtherance of conspiracy), *cert. denied*, 459 U.S. 854 (1982). See also *United States v. James*, 510 F.2d 546, 549 (5th Cir.), *cert. denied*, 423 U.S. 855 (1975). The *James* court noted that statements made during a mere conversation between coconspirators are not admissible under the exception. 510 F.2d at 549. Puffing, boasts, and other conversation, however, are admissible when used by the declarant to obtain the confidence of one involved in the conspiracy. *United States v. McGuire*, 608 F.2d 1028, 1033 (5th Cir. 1979), *cert. denied*, 446 U.S. 910 (1980).

142. *United States v. Tombrello*, 666 F.2d 485, 490-91 (11th Cir.) (statements made by coconspirator to undercover FBI agent held to have been made in furtherance of conspiracy), *cert. denied*, 456 U.S. 994 (1982).

143. *United States v. Groce*, 682 F.2d 1359, 1363-65 (11th Cir. 1982) (marked nautical chart admitted as statement made in furtherance of conspiracy); *United States v. Saimiento-Rozo*, 676 F.2d 146, 149 (5th Cir. 1982) (ship's log book and navigational chart admitted as statement made in furtherance of conspiracy).

144. See MODEL CODE OF EVIDENCE Rule 508(b) (1942) (requiring only that statement be "relevant" to conspiracy and made during its pendency). See also *United States v. Moore*, 522 F.2d 1068, 1077 n.5 (9th Cir. 1975), *cert. denied*, 423 U.S. 1049 (1976). One commentator has suggested eliminating the requirement from the coconspirator hearsay rule and replacing it with a ban on evidence that is self-serving. Levie, *supra* note 2, at 1172.

145. See, e.g., *United States v. Nixon*, 418 U.S. 683, 701 (1974); *Anderson v. United States*, 417 U.S. 211, 219 (1974); *Wong Sun v. United States*, 371 U.S. 471, 490 (1963); *Krulewitch v. United States*, 336 U.S. 440, 443-44 (1949).

146. FED. R. EVID. 801(d)(2)(E) advisory committee note. One commentator has characterized the Advisory Committee's retention of the "in furtherance" requirement as an attempt to "strike a balance between the great need for conspirators' statements in combating undesirable criminal activity which is inherently secretive and difficult of proof, and the need to protect the accused against idle chatter of criminal partners as well as inadvertently misreported and deliberately fabricated evidence." 4 J. WEINSTEIN & M. BERGER, *supra* note 27, ¶ 801(d)(2)(E)[01], at 801-235.

vance the objectives of the conspiracy.¹⁴⁷ This requirement provides no affirmative assurance of reliability, but it affords limited protection from certain types of inherently unreliable declarations.¹⁴⁸ For example, narrative statements relating past events are not considered to have been made in furtherance of a conspiracy.¹⁴⁹ Additionally, confessions made to law enforcement officials,¹⁵⁰ and statements which are conversational or mere bragging do not satisfy the requirement.¹⁵¹ These limitations are not absolute, however, and courts have shown little aversion to finding the requirement satisfied by any statement that might be loosely interpreted as advancing a goal of the conspiracy.¹⁵²

147. J. WEINSTEIN & M. BERGER, *supra* note 27, ¶ 801(d)(2)(E)[01], at 801-233 to -234. "[A] damaging statement by a coconspirator is not [in furtherance of a conspiracy] unless it tends to advance the objects of the conspiracy since it would otherwise operate to frustrate rather than further the illegal design." *Id.* See *U.S. v. Hamilton*, 689 F.2d 1262, 1269-70 (6th Cir. 1982) ("statements need not actually further the conspiracy to be admissible," as long as they were "intended to promote conspiratorial objectives"), *cert. denied*, 459 U.S. 1117 (1983).

148. For a discussion of the degree of reliability provided by the "in furtherance" requirement, see *supra* note 139.

149. *United States v. Phillips*, 664 F.2d 971, 1027 (5th Cir. 1981) (casual, retrospective statements and idle conversation between coconspirators are not in furtherance of conspiracy), *cert. denied*, 457 U.S. 1136 (1982). Narrative statements are not considered to be made in furtherance of a conspiracy whether made to outsiders or members of the conspiracy. See *United States v. Provenzano*, 620 F.2d 985, 1000-01 (3d Cir.) (coconspirator's admissions to his girlfriend and to one of his employees were not made in furtherance of conspiracy), *cert. denied*, 449 U.S. 899 (1980). *United States v. Moore*, 522 F.2d 1068, 1077 (9th Cir. 1975) ("casual admission of culpability" to person that coconspirator "decided to trust" was not made in furtherance of conspiracy), *cert. denied*, 423 U.S. 1049 (1976).

150. *United States v. Meacham*, 626 F.2d 503, 510-11 & n.8 (5th Cir. 1980) (statements made by coconspirator to police to assist in bringing other conspirators to justice were not made in furtherance of conspiracy).

151. See *Battle v. Lubrizol Corp.*, 673 F.2d 984, 990 (8th Cir. 1982) (conspirator's boasts to his office staff were not statements made in furtherance of conspiracy), *cert. denied*, 104 S. Ct. 1718 (1984); *United States v. Traylor*, 656 F.2d 1326, 1332-33 (9th Cir. 1981) (casual admissions of culpability and conversational statements of coconspirator to someone he decided to trust were not made in furtherance of conspiracy).

152. See, e.g., *United States v. Sears*, 663 F.2d 896, 905 (9th Cir. 1981) (since description of robbery to third persons was necessary to facilitate conspirators' escape, description was given in furtherance of conspiracy), *cert. denied*, 455 U.S. 1027 (1982); *United States v. Pool*, 660 F.2d 547, 562 (5th Cir. 1981) (narrative statements to other conspirators are admissible under rule 801(d)(2)(E) because "when a conspirator provides information to his coconspirators necessary to keep them abreast of the conspiracy's current status, such statements are properly admitted as coconspirator declarations"); *United States v. McGuire*, 608 F.2d 1028, 1033 (5th Cir. 1979) (coconspirators' puffing, boasts, and other conversation are admissible under rule 801(d)(2)(E) when used by declarant to obtain confidence of one involved in conspiracy).

III. THE CONFRONTATION CLAUSE AND THE HEARSAY RULE

The sixth amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"¹⁵³ The right to confrontation has been identified as the right of a criminal defendant to have his accusers brought before him "face-to-face,"¹⁵⁴ and has been recognized as one of the fundamental requirements of a fair trial.¹⁵⁵ Face-to-face confrontation sets a minimum standard of reliability for testimony introduced in a criminal proceeding by assuring that a declarant testifies under oath, is subject to cross-examination by opposing counsel, and is subject to observation by the jury.¹⁵⁶ The right to face-to-face confrontation, however, may be overridden by other legitimate interests in the criminal justice system.¹⁵⁷

153. U.S. CONST. amend. VI. The sixth amendment's confrontation clause evolved as a reaction to abuses under the English common law. See *California v. Green*, 399 U.S. 149, 156-57 (1970) (quoting 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 326 (1883)). In *Green*, the Supreme Court described the trial of Sir Walter Raleigh as one of the historical antecedents of the confrontation clause:

A famous example is provided by the trial of Sir Walter Raleigh for treason in 1603. A crucial element of the evidence against him consisted of the statements of one Cobham, implicating Raleigh in a plot to seize the throne. Raleigh had since received a written retraction from Cobham, and believed that Cobham would now testify in his favor. After a lengthy dispute over Raleigh's right to have Cobham called as a witness, Cobham was not called, and Raleigh was convicted. At least one author traces the Confrontation Clause to the common-law reaction against these abuses of the Raleigh trial.

Id. at 157 n.10 (citations omitted).

154. See *Ohio v. Roberts*, 448 U.S. 56, 63 (1980) ("the Confrontation Clause reflects a preference for face-to-face confrontation at trial").

155. *Pointer v. Texas*, 380 U.S. 400, 405 (1965). The *Pointer* Court emphasized that "[t]here are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Id.*

156. *California v. Green*, 399 U.S. 149, 158 (1970). The requirement of a sworn oath facilitates reliability by impressing the gravity of the testimony on a witness, as well as giving the witness notice of the possibility of sanctions for perjury. *Id.* Cross-examination is seen as the defendant's strongest assurance of reliability, and is deemed the "greatest legal engine ever invented for the discovery of truth." *Id.* (quoting 5 J. WIGMORE, EVIDENCE § 1367, at 32 (Chadbourn rev. ed. 1974)). Allowing a jury to observe a witness as he testifies enhances the jury's ability to weigh the witness' credibility. *Id.* See also *Davenport*, *supra* note 21, at 1278-81 (discussing protections provided by confrontation clause).

157. *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). In *Chambers*, the Court observed:

Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. But its denial or significant diminution calls into question the ultimate "integrity of the fact-finding process" and requires that the competing interest be closely examined.

When a hearsay statement is admitted into evidence, the declarant, by definition, is not present at trial to be confronted by the accused.¹⁵⁸ Because there is a strong public policy in favor of using relevant evidence at trial to further effective law enforcement, the Supreme Court has developed a body of case law that creates, for some hearsay statements, exceptions to the sixth amendment's requirement of face-to-face confrontation.¹⁵⁹ The cases have attempted to strike a balance between absolute prohibition of hearsay when a declarant is not present at trial, and total admissibility of all hearsay statements.¹⁶⁰

*Mattox v. United States*¹⁶¹ was the first Supreme Court decision to interpret the criminal defendant's sixth amendment right of confrontation. In *Mattox*, the Court permitted a departure from the rule of face-to-face confrontation when testimony given by witnesses at an earlier trial was introduced in a second trial held after the witnesses had died.¹⁶² The Court identified two criteria to be met before hearsay evidence is admissible under the confrontation clause.¹⁶³ First, the necessities of the case must require admission;¹⁶⁴ and second, the hearsay

Id. (citing omitted).

158. See Garland & Snow, *supra* note 15, at 3-4, 14-15.

159. See, e.g., *Ohio v. Roberts*, 448 U.S. 56, 64 (1980). In *Roberts*, the Court noted that "every jurisdiction has a strong interest in effective law enforcement, and in the development and precise formulation of the rules of evidence applicable in criminal proceedings." *Id.* For a discussion of how the admission of coconspirator statements facilitates the effective prosecution of criminal cases involving conspiracy, see *supra* notes 7-10 and accompanying text.

160. For a general discussion of the evolution of the Supreme Court's treatment of the competing interests underlying the confrontation clause and the exceptions to the hearsay rule, see Garland & Snow, *supra* note 15, at 14-22; Marcus, *supra* note 27, at 308-14; Note, *Inculpatory Statements Against Penal Interest and the Confrontation Clause*, 83 COLUM. L. REV. 159 (1983) [hereinafter cited as Note, *Inculpatory Statements*]; Note, *State v. Roberts: Balancing the Right to Confront with the Admission into Evidence of Preliminary Hearing Testimony*, 10 CAP. U.L. REV. 365, 368-79 (1980) [hereinafter cited as Note, *Balancing Confrontation*]; Casenote, *The Confrontation Clause and the Catch-all Exception to the Hearsay Doctrine*; *Hopkinson v. State*, 17 LAND & WATER L. REV. 703, 705-710 (1982) [hereinafter cited as Casenote, *Catch-all Exception*]; Casenote, *Admission of Evidence of an Unavailable Declarant's Preliminary Hearing Testimony Does Not Violate a Defendant's Right of Confrontation Guaranteed by the Sixth Amendment when the Testimony was Subject to Questioning Equivalent to Significant Cross-Examination: Ohio v. Roberts*, 59 U. DET. J. URB. L. 127, 130-35 (1981) [hereinafter cited as Casenote, *Preliminary Hearing Testimony*].

161. 156 U.S. 237 (1895).

162. *Id.* at 240-44. In *Mattox*, two prosecution witnesses died between the time of the defendant's original trial and the time of his retrial. *Id.* at 240. The prosecution attempted to have the witnesses' testimony from the first trial read at the second trial. *Id.* The defendant objected, claiming his sixth amendment right to confrontation was being violated. *Id.*

163. *Id.* at 242-44. In establishing these criteria the Court drew an analogy to the admission of dying declarations. *Id.* at 243-44. The Court noted that technical adherence to the confrontation clause would mandate exclusion of dying declarations, but they are admitted because they are inherently trustworthy and their admission would prevent a "manifest failure of justice." *Id.* at 243-44.

164. *Id.* at 244. In *Mattox*, the necessity of using hearsay evidence was

evidence to be admitted must be shown to be competent.¹⁶⁵ These two criteria—necessity and competence—subsequently have become the essence of the Supreme Court's confrontation clause jurisprudence.¹⁶⁶

A group of cases decided by the Supreme Court during the 1960's and early 1970's focused on the opportunity to cross-examine a witness as the central test of competence under the confrontation clause.¹⁶⁷ In *Pointer v. Texas*,¹⁶⁸ the Court held that admission of prior testimony of an unavailable witness violated the confrontation clause when the defendant had no previous opportunity to cross-examine the witness.¹⁶⁹ Later cases extended this reasoning to strike down the admission of prior out-of-court confessions of unavailable witnesses.¹⁷⁰ In *California v.*

demonstrated by showing that the declarants were unavailable to testify at trial because they were dead. *Id.*

165. *Id.* at 244. In *Mattox*, the Court held that the evidence was competent based on the previous cross-examination of the witnesses. *Id.*

166. See, e.g., *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980). In *Roberts*, the Supreme Court's most recent recitation of this analysis, the Court stated that the confrontation clause restricts admission of hearsay in two ways: (1) the rule of necessity requiring face-to-face confrontation is abdicated only upon the offeror's demonstration of the unavailability of witnesses; and (2) the rule of competence now requires that hearsay be accompanied by "indicia of reliability," which would essentially render the statements as trustworthy as if the evidence in question did comport with the general rule. *Id.*

167. See *California v. Green*, 399 U.S. 149 (1970); *Bruton v. United States*, 391 U.S. 123 (1968); *Douglas v. Alabama*, 380 U.S. 415 (1965); *Pointer v. Texas*, 380 U.S. 400 (1965).

168. 380 U.S. 400 (1965).

169. *Id.* at 406-08. In *Pointer*, a witness was questioned by a prosecutor in a preliminary hearing at which the defendant did not have an attorney. *Id.* at 401. The witness was unavailable at the time of trial, because he had moved out of state and did not intend to return. *Id.* The prosecution moved to enter his preliminary hearing testimony into evidence. *Id.* The trial court granted the motion over the defendant's objection, reasoning that the defendant had been present at the preliminary hearing, and that the fact that no lawyer had been appointed for him was not germane. *Id.* at 402. The defendant was convicted, and the verdict was affirmed by the Texas Court of Criminal Appeals, but the Supreme Court of the United States reversed the conviction on the ground that the defendant had been denied his sixth amendment rights. *Id.* at 402, 407-08.

170. See, e.g., *Douglas v. Alabama*, 380 U.S. 415, 420 (1965). In *Douglas*, a document embodying a confession by Douglas' alleged partner in crime, who had already been tried and convicted prior to Douglas' trial, was read into evidence after the declarant asserted his privilege against self-incrimination, and despite the declarant's failure to testify and subsequent refusal to take the stand at Douglas' trial. *Id.* at 416-17. Although marked as an exhibit, the document itself was never offered into evidence. *Id.* at 417. The Supreme Court determined that admission of the statement violated Douglas' right to confrontation because Douglas was afforded no opportunity to cross-examine the declarant. *Id.* at 419-20.

See also *Bruton v. United States*, 391 U.S. 123, 127-28 (1968). In *Bruton*, the relevant facts were the same as those in *Douglas*, except that Bruton and his partner in crime were tried together on charges of armed postal robbery. *Id.* at 124. At trial, the oral confession of Bruton's codefendant, Evans, was read into evidence and attested to by the postal inspector who interrogated Evans after he

Green,¹⁷¹ the Court held that admission of prior testimony of an unavailable witness did not violate the sixth amendment because the defendant had been able to cross-examine the witness in a previous hearing.¹⁷² The *Green* Court also stated that the confrontation clause would not have been violated by the introduction of an out-of-court statement at trial if the declarant was then available for cross-examination.¹⁷³ In discussing the competence of hearsay evidence generally, the *Green* Court noted that the common-law hearsay rule and the sixth amendment's confrontation clause were designed to protect similar values, but that evidence admissible under the hearsay rule or one of its exceptions is not necessarily admissible under the confrontation clause.¹⁷⁴

In *Barber v. Page*,¹⁷⁵ the Supreme Court focused upon the confrontation clause's requirement of necessity.¹⁷⁶ The *Barber* Court held that

was notified that the police had previously obtained an unconstitutional confession from Evans. *Id.* at 124 & n.1. Evans invoked his fifth amendment rights and never took the stand. *Id.* at 124. The judge instructed the jury that they could not consider the confession with regard to Bruton, but Bruton was convicted anyway. *Id.* at 124-25 & n.2. The Supreme Court determined that Bruton's sixth amendment right of confrontation had been violated and that the violation could not be cured with a cautionary instruction. *Id.*

171. 399 U.S. 149 (1970).

172. *Id.* at 165-66. In *Green*, a witness testified at a preliminary hearing at which Green and his attorney were present and also made a statement to a police officer inculcating Green. *Id.* at 151. At trial the witness' memory failed unexpectedly. *Id.* at 151-52. The prosecutor then read portions of the witness' preliminary hearing testimony to the witness and into the record as a prior inconsistent statement. *Id.* at 152. Later in the trial the police officer also testified regarding the witness' previous out-of-court statement. *Id.* The Supreme Court found the admission of the preliminary hearing testimony was not a violation of the confrontation clause because Green had been afforded an opportunity to cross-examine the witness. *Id.* at 165-66.

173. *Id.* at 164. Regarding the witness' previous out-of-court statement, the Court concluded:

[T]he Confrontation Clause does not require excluding from evidence the prior statements of a witness who concedes making the statements, and who may be asked to defend or otherwise explain the inconsistency between his prior and his present version of the events in question, thus opening himself to full cross-examination at trial as to both stories.

Id.

174. *Id.* at 155-56. The *Green* court stated:

While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception.

Id.

175. 390 U.S. 719 (1968).

176. *Id.* at 724-26. In *Barber*, the petitioner was charged jointly with, but

the prosecution must prove the necessity of using out-of-court statements at trial by demonstrating that the declarant is unavailable,¹⁷⁷ and that the prosecution has made a good faith effort to procure the declarant's attendance at trial.¹⁷⁸ Most recently, the Supreme Court in *United*

tried separately from, a codefendant. *Id.* at 720. At the time of petitioner's trial, the alleged partner in crime was incarcerated in another state. *Id.* At the petitioner's trial, the prosecution was allowed to introduce into evidence a transcript of the partner's testimony at a preliminary hearing by claiming the partner was unavailable for trial. *Id.* The petitioner was convicted. *Id.*

177. *Id.* at 725-26. In *Barber*, the Court refused to find that the declarant's mere absence from the state of trial constituted unavailability under the confrontation clause. *Id.* at 724-25. However, the Supreme Court has identified several situations in which a declarant will be considered "unavailable." See *Ohio v. Roberts*, 448 U.S. 56, 75 (1980) (declarant was unavailable where she had disappeared and prosecution was unable to produce her at trial through reasonable "good faith efforts"); *Mancusi v. Stubbs*, 408 U.S. 204, 212 (1972) (declarant permanently absent from country was unavailable); *California v. Green*, 399 U.S. 149, 167-68 (1970) (declarant who had memory lapse at trial was unavailable); *Mattox v. United States*, 156 U.S. 237, 243-44 (1895) (death of declarant constituted unavailability). Further criteria sufficient to constitute unavailability for the purposes of the confrontation clause may be found in rule 804(a). The definition of unavailability in rule 804(a) provides:

"Unavailability as a witness" includes situations in which the declarant—

- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or
- (2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or
- (3) testifies to a lack of memory of the subject matter of his statement; or
- (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivisions (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

FED. R. EVID. 804(a).

178. 390 U.S. at 724-25. The *Barber* Court required the prosecution to make a "good faith effort" to obtain a witness' attendance at trial before the witness would be declared unavailable. However, the Court did not define "good faith effort." *Id.* For a discussion of how the Supreme Court has subsequently interpreted the "good faith effort" requirement of unavailability, see *infra* notes 190 & 193-94 and accompanying text.

The Supreme Court also has held that when a witness was not available to testify at trial because of the Government's negligence, use of his prior statements violated a criminal defendant's sixth amendment right to confrontation. *Motes v. United States*, 178 U.S. 458, 471 (1900). In *Motes*, the Court also observed that if the defendant can be shown to be responsible for a witness' absence from trial, the defendant "cannot complain if competent evidence is admitted to supply the place of that which he has kept away." *Id.* at 471-72 (quoting *Reynolds v. United States*, 98 U.S. 145, 158 (1878)).

*States v. Inadi*¹⁷⁹ narrowed the unavailability requirement of *Barber* to situations where the coconspirator statements sought to be introduced consist of testimony given at some other proceeding. Distinguishing such "former testimony" from the "out-of-court" coconspirator statements at issue in *Inadi*, the Court held that out-of-court coconspirator statements are admissible over a confrontation clause objection without regard to the declarant's unavailability.¹⁸⁰

In 1970, the Supreme Court broadened the focus of its confrontation clause competence analysis in its plurality opinion in *Dutton v. Evans*.¹⁸¹ Instead of requiring an opportunity to cross-examine the

179. 54 U.S.L.W. 4258, 4259-60 (U.S. Mar. 10, 1986) (finding that *Barber* "specifically limited the unavailability exception to prior testimony").

180. *Id.* at 4260. Distinguishing *Inadi* from *Barber*, the Court stated:

There are good reasons why the unavailability rule, developed in cases involving former testimony, is not applicable to co-conspirators' out-of-court statements. Unlike some other exceptions to the hearsay rules, or the exemption from the hearsay definition involved in this case, former testimony often is only a weaker substitute for live testimony. It seldom has independent evidentiary significance of its own, but is intended to replace live testimony. If the declarant is available and the same information can be presented to the trier of fact in the form of live testimony, with full cross-examination and the opportunity to view the demeanor of the declarant, there is little justification for relying on the weaker version. When two versions of the same evidence are available, longstanding principles of the law of hearsay, applicable as well to Confrontation Clause analysis, favor the better evidence.

Id. (citing Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 143 (1972)).

181. 400 U.S. 74, 88-89 (1970) (plurality opinion). In *Dutton*, Evans was tried and convicted of first-degree murder. *Id.* at 76. At Evans' trial, a post-arrest statement of Evans' partner in crime was admitted under Georgia law as a coconspirator statement. *Id.* at 76-78. The declarant did not testify at the trial, but his statement was introduced through the testimony of a prison acquaintance. *Id.* at 77-78. The prisoner testified that he had asked the declarant how he had made out in court following the declarant's arraignment on criminal charges. *Id.* at 77. The prisoner then testified that the declarant responded, "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now." *Id.* Although the statement was made during the concealment period of the conspiracy, it was admissible under Georgia law as having been made "during the course of the conspiracy." *Id.* at 78. For a discussion of the pendency requirement of rule 801(d)(2)(E), see *supra* notes 117-136 and accompanying text.

The opinion in *Dutton* was a plurality opinion. 400 U.S. at 74. Writing for the plurality, Justice Stewart, was joined by Chief Justice Burger, Justice White, and Justice Blackmun. Justice Blackmun also filed a concurring opinion joined by the Chief Justice. The fifth member of the majority, Justice Harlan, filed a separate opinion, concurring in the result only. Justice Marshall filed a dissenting opinion joined by Justice Black, Justice Douglas, and Justice Brennan.

In his concurring opinion, Justice Harlan argued that the confrontation clause was not designed to weigh "the appropriateness of rules of evidence" and that the task would be better performed as a function of due process. *Id.* at 96-97 (Harlan, J., concurring). In rejecting the majority's interpretation of the sixth amendment, Justice Harlan stated:

Regardless of the interpretation one puts on the words of the Con-

declarant about his previous statements, the *Dutton* plurality analyzed the inherent reliability of the hearsay statements as offered.¹⁸² The Court held that an out-of-court statement made by a declarant who had never been cross-examined, could be used at trial because it bore sufficient indicia of reliability.¹⁸³ Noting that the purpose of the confrontation clause was to assure "accuracy of the truth-determining process in criminal trials,"¹⁸⁴ the *Dutton* plurality identified the following four possible indicia of reliability: (1) whether the statement was a mere assertion of past fact;¹⁸⁵ (2) whether the declarant had personal knowledge of the facts he related;¹⁸⁶ (3) whether the statement may have been based on faulty recollection;¹⁸⁷ and (4) whether the circumstances under which the statement was made indicate that the declarant may have mis-

frontation Clause, the clause is simply not well designed for taking into account the numerous factors that must be weighed in passing on the appropriateness of rules of evidence. The failure of Mr. JUSTICE STEWART's opinion to explain the standard by which it tests Shaw's statement, or how this standard can be squared with the seemingly absolute command of the clause, bears witness to the fact that the clause is being set a task for which it is not suited. The task is far more appropriately performed under the aegis of the Fifth and Fourteenth Amendments' commands that federal and state trials, respectively, must be conducted in accordance with due process of law. It is by this standard that I would test federal and state rules of evidence.

Id.

182. *Id.* at 89 (plurality opinion). For a discussion of the application and expansion of *Dutton*'s indicia of reliability by the federal courts, see *infra* notes 202-224 and accompanying text.

183. 400 U.S. at 89 (plurality opinion). The Court emphasized that "the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.'" *Id.* (quoting *California v. Green*, 399 U.S. 149, 161 (1970)).

184. *Id.* at 88 (plurality opinion). The *Dutton* Court reasoned that because the out-of-court statement admitted "contained no express assertion about past fact," its reliability was subject to the scrutiny of the jury who had been put on warning "against giving the statement undue weight." *Id.* It should be noted that an assertion of past fact generally will violate the "in furtherance" requirement of rule 801(d)(2)(E). See *supra* note 149 and accompanying text.

185. 400 U.S. at 88-89 (plurality opinion). The *Dutton* Court found that the declarant's personal knowledge of the identity and roles of the participants in the crime being tried was established by two factors. *Id.* First, the declarant had been linked to the crime by an unindicted, coconspirator who testified at trial. *Id.* at 88 (plurality opinion). Second, the declarant already had been convicted of the crime when Evans was brought to trial. *Id.* The Court also reasoned that any cross-examination of the declarant would yield little to discredit the declarant's personal knowledge. *Id.* at 88-89 (plurality opinion).

186. *Id.* at 89 (plurality opinion). The *Dutton* Court simply asserted that "the possibility that [the declarant's] statement was founded on faulty recollection is remote in the extreme." *Id.* The Court gave no explanation, however, for reaching its conclusion. *Id.*

187. *Id.* In *Dutton*, the Court observed that the circumstances surrounding the statement gave no indication that the declarant had a reason to lie. *Id.* In addition, the Court found that the veracity of the statement was bolstered by the

represented the truth.¹⁸⁸

The Supreme Court reiterated an indicia of reliability standard of evidentiary competence in *Mancusi v. Stubbs*.¹⁸⁹ The *Mancusi* Court treated a previous opportunity to cross-examine a currently unavailable declarant as an additional indicia of reliability sufficient to overcome the sixth amendment's requirement of face-to-face confrontation.¹⁹⁰ The Court did, however, specifically predicate admissibility of the prior statements upon a showing of necessity.¹⁹¹

In *Ohio v. Roberts*, the Supreme Court construed the sixth amendment as establishing a "preference" for face-to-face confrontation.¹⁹² The *Roberts* Court stated that the requirement of necessity is a reflection of this preference, requiring in most cases that the prosecution either produce the declarant or demonstrate that he is unavailable.¹⁹³ The Court refined the definition of unavailability, holding that the prosecution's duty to make a good-faith attempt to procure a declarant's attendance at trial is extended only to reasonable efforts and need not include measures which are highly unlikely to lead to production of the

fact that the declarant made the statement spontaneously, and that it was against his penal interest. *Id.*

188. 408 U.S. 204, 213 (1972). In *Mancusi*, defendant Stubbs was granted a second trial after nine years of incarceration on a murder charge. *Id.* at 209. During the nine years, the prosecution's key witness moved to Sweden and was unable to be reached by subpoena. *Id.* Accordingly, the trial court allowed the witness' testimony from the first trial to be read into evidence during the second trial. *Id.* Stubbs was convicted a second time. *Id.*

189. *Id.* at 216. The court noted that since there was adequate opportunity to cross-examine the witness at the first trial, and defense counsel did avail himself of that opportunity, there were sufficient indicia of reliability upon which the trier of fact could evaluate the truth of the prior testimony. *Id.*

190. *Id.* at 209-13, 216. The Court determined that the witness' permanent residence in Sweden precluded the state court in Tennessee from obtaining jurisdiction over him. *Id.* at 211-12. Therefore, the witness was unavailable for purposes of the confrontation clause. *Id.* at 212. For a discussion of other situations in which a witness is deemed "unavailable," see *supra* note 177.

191. 448 U.S. 56 (1980). Roberts was charged with check forgery and possession of stolen credit cards. *Id.* at 58. At a preliminary hearing, Roberts called a witness to corroborate his defense. *Id.* at 58. The witness became hostile and refused to cooperate with Roberts' attorney. *Id.* Defense counsel, however, did not have the witness declared hostile nor did he request permission to cross-examine her. *Id.* The defense counsel asked 17 leading questions in his direct examination. *Id.* at 70. The witness proceeded to testify against Roberts. *Id.* at 58. At Roberts' trial, the prosecution introduced the witness' preliminary hearing testimony, claiming that the witness was unavailable. *Id.* at 59. At the time of trial, the prosecutor had been unable to locate the witness although several attempts had been made. *Id.* For a detailed analysis of *Roberts*, see Note, *Balancing Confrontation*, *supra* note 160; Casenote, *Preliminary Hearing Testimony*, *supra* note 160.

192. 448 U.S. at 63, 65.

193. *Id.* at 65. Unavailability must be demonstrated even in cases where prior cross-examination has occurred. *Id.* For a discussion of the Supreme Court's earlier interpretation of the unavailability requirement, see *supra* notes 177 & 190.

declarant.¹⁹⁴

The most significant aspect of the *Roberts* decision has become its refinement of the standard of reliability to be applied under the confrontation clause.¹⁹⁵ The *Roberts* Court noted that once a witness is found to be "unavailable,"¹⁹⁶ his out-of-court statements are admissible at trial only if they are accompanied by indicia of reliability sufficient to "afford the trier of fact a satisfactory basis for evaluating the truth of the prior statements."¹⁹⁷ The Court then held that a previous opportunity to cross-examine an unavailable witness, which was exercised by counsel, was a sufficient indicia of reliability in and of itself.¹⁹⁸ The Court also noted that if a hearsay statement fits within "a firmly rooted hearsay exception,"¹⁹⁹ the statement can be inferred to be sufficiently reliable to meet the requirements of the confrontation clause.²⁰⁰

194. 448 U.S. at 75-76. In *Roberts*, the prosecution had been unable to locate the witness, who was traveling outside the state. *Id.* at 75. The prosecutor issued five subpoenas to the witness at her parents home but she received none of them. *Id.* The prosecutor also questioned the witness' parents who also were unable to locate the witness. *Id.* Although the prosecutor could have taken further action, the Court did not find this was necessary to meet his obligation to make a good-faith attempt to secure the witness' attendance at trial. *Id.* at 76.

195. For a discussion of the reliability analysis set forth in *Roberts*, see Case-note, *Preliminary Hearing Testing*, *supra* note 160, at 135-42.

196. 448 U.S. at 65. The *Roberts* Court noted, however, that unavailability need not always be demonstrated before a hearsay statement may be admitted. *Id.* at 65 n.7 (citing *Dutton v. Evans*, 400 U.S. 74, 88-89 (1970)). For a further discussion of *Dutton*, see *supra* notes 179-87 and accompanying text. See also *United States v. Inadi*, 54 U.S.L.W. 4258 (U.S. Mar. 10, 1986) (unavailability irrelevant where coconspirator statement sought to be introduced was made "out-of-court" rather than in former testimony). For a further discussion of *Inadi*, see *supra* notes 179-80 and accompanying text.

197. 448 U.S. at 65-66 (quoting *California v. Green*, 399 U.S. 149, 161 (1970)). The *Roberts* Court noted that the purpose of the confrontation clause is to "augment accuracy in the factfinding process." *Id.* at 65.

198. *Id.* at 73. Although *Roberts*' counsel had not expressly been given the right to cross-examine the witness in the preliminary hearing, the Court found that the examination was a cross-examination in form. *Id.* at 70-71 & n.11. The Court also refused to search for particular indicia of reliability, reasoning that the earlier cross-examination of the witness made the statements sufficiently reliable in and of itself. *Id.* at 72-73. Accord *California v. Green*, 399 U.S. 149 (1970); *Mattox v. United States*, 156 U.S. 237 (1895).

199. *Roberts*, 448 U.S. at 66.

200. *Id.* In analyzing the hearsay rule and its exceptions, the *Roberts* Court noted that the exceptions are neither uniformly recognized nor uniformly enforced among the jurisdictions, and compared them to "an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists." *Id.* at 62 (quoting Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 921 (1937)). The Court then stated:

The Court has applied this "indicia of reliability" requirement principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the "substance of the constitutional protection." This reflects the truism that "hearsay rules and the Confrontation Clause are generally designed to protect similar values," and "stem

IV. THE APPLICATION OF THE CONFRONTATION CLAUSE'S REQUIREMENT OF RELIABILITY TO RULE 801(d)(2)(E)

The Supreme Court of the United States has never subjected the reliability of coconspirator statements admissible under rule 801(d)(2)(E) to confrontation clause scrutiny.²⁰¹ In *Dutton v. Evans*, however, the Court did apply the confrontation clause to a statement admitted under Georgia's coconspirator exception to the hearsay rule,²⁰² and determined that case-by-case analysis was necessary to determine if statements so admitted bore sufficient indicia of reliability.²⁰³ Rule 801(d)(2)(E) has been more narrowly construed than the coconspirator exception reviewed in *Dutton*,²⁰⁴ and the federal courts of ap-

from the same roots." It also responds to the need for certainty in the workaday world of conducting criminal trials.

In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Id. at 66 (citations and footnotes omitted). For a further discussion of the hearsay exceptions which are considered "firmly rooted," see *infra* notes 222-232 and accompanying text. For a general discussion of the hearsay exceptions and non-hearsay under the Federal Rules of Evidence, see *supra* notes 17-21 and accompanying text.

201. See *United States v. Inadi*, 54 U.S.L.W. 4258, 4259 & n.3 (U.S. Mar. 10, 1986) (holding unavailability need not be demonstrated before "out-of-court" coconspirator statements are admissible, but reserving judgment as to whether such statements must be shown to be reliable). *Sanson v. United States*, 104 S. Ct. 3559, 3560 (1984) (White, J., dissenting from denial of certiorari) (advocating review of confusing question of whether statements that satisfy rule 801(d)(2)(E) necessarily satisfy the requirements of the confrontation clause), *denying cert.* to 727 F.2d 1113 (7th Cir. 1984).

202. 400 U.S. at 81-82, 87-90. The Georgia statute provided: "After the fact of conspiracy shall be proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all." *Id.* at 78 (citing GA. CODE ANN. § 38-306 (1954)).

203. 400 U.S. at 87-89. The *Dutton* Court observed that the Georgia coconspirator exception was "long established under state statutory law," and that it was susceptible to interpretation both in compliance with and in violation of the confrontation clause. *Id.* at 87-88. The Court looked to the presence of indicia of reliability to determine whether the application of the rule under the circumstances of the case was consistent with the confrontation clause. *Id.* at 88-89. For a further discussion of the indicia of reliability relied upon by the *Dutton* Court, see *supra* notes 181-87 and accompanying text.

204. See, e.g., *United States v. Ordonez*, 737 F.2d 793, 812-14 (9th Cir. 1984) (Norris, J., concurring in part). In his partial concurrence to *Ordonez*, Judge Norris pointed out that the Georgia coconspirator hearsay rule scrutinized by the *Dutton* court was less stringent than rule 801(d)(2)(E) because the Georgia rule permitted admission of statements made during the concealment period of the conspiracy. *Id.* at 812-13. For a discussion of the Georgia coconspirator exception to the hearsay rule, see *supra* note 179. For a discussion of the admissibility of coconspirators' statements during the concealment period of

peals have split over the issue of whether statements admitted under rule 801(d)(2)(E) must also be tested for reliability on a case-by-case basis, or whether such statements are per se reliable as "firmly rooted hearsay exceptions."²⁰⁵

The Second,²⁰⁶ Third,²⁰⁷ Eighth,²⁰⁸ Ninth,²⁰⁹ and Tenth²¹⁰ Circuits have held that the confrontation clause requires every coconspirator statement to be supported by independent indicia of reliability before it may be admitted at trial. These circuits have rejected the notion that the coconspirator hearsay rule codified in rule 801(d)(2)(E) is a

conspiracy under rule 801(d)(2)(E), see *supra* notes 128-30 and accompanying text.

205. *Sanson v. United States*, 104 S. Ct. 3559 (1984) (White, J., dissenting from denial of certiorari), *denying cert. to* 727 F.2d 1113 (7th Cir. 1984). In his dissent, Justice White noted that the federal circuits are divided on the question of whether rule 801(d)(2)(E) is a "firmly rooted hearsay exception," and advocated a grant of certiorari to resolve this issue. *Id.* See also *Means v. United States*, 105 S. Ct. 541, (1984) (White, J., dissenting from denial of certiorari) (noting that the circuits remain split over the question of "whether a coconspirator's statement that is admissible under the Federal Rules automatically satisfies the requirements of the Confrontation Clause"), *denying cert. to* 729 F.2d 1462 (6th Cir. 1984).

206. *United States v. Wright*, 588 F.2d 31 (2d Cir. 1978) (there must be case-by-case examination of coconspirator statements to determine if their admission has abridged confrontation clause), *cert. denied*, 440 U.S. 917 (1979).

207. *United States v. Ammar*, 714 F.2d 238, 256 (3d Cir.) ("It must be separately ascertained whether coconspirator statements sought to be admitted are attended by adequate assurances of reliability."), *cert. denied*, 464 U.S. 936 (1983).

208. *United States v. Massa*, 740 F.2d 629, 639 (8th Cir. 1984) (confrontation clause inquiry was not satisfied by meeting prerequisites of rule 801(d)(2)(E) alone; other factors relevant to reliability also were considered, *cert. denied*, 105 S. Ct. 2357 (1985).

209. *United States v. Ordonez*, 737 F.2d 793, 803-04 (9th Cir. 1984) (trial court must undertake reliability inquiry considering factors set forth in *Dutton* prior to admission of coconspirator statements); *United States v. Perez*, 658 F.2d 654, 660-61 (9th Cir. 1981) ("Admission under the coconspirator exception does not automatically guarantee compliance with the Confrontation Clause.").

210. *United States v. Roberts*, 583 F.2d 1173, 1176 (10th Cir. 1978), *cert. denied*, 439 U.S. 1080 (1979). In *United States v. Roberts*, the Tenth Circuit stated: Simply pigeon-holing evidence into a recognized exception is insufficient to show compliance with the confrontation clause. In the case of a coconspirator's extrajudicial declarations, Sixth Amendment compliance is tested on a case by case basis by examining all the circumstances to determine whether "the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement."

583 F.2d at 117 (citations omitted). It should be noted that *United States v. Roberts* was decided before the Supreme Court recognized the reliability of "firmly rooted hearsay exceptions" in *Ohio v. Roberts*. Subsequent to the Supreme Court's decision, however, the Tenth Circuit reaffirmed its adherence to the case-by-case reliability analysis. See *United States v. McManaman*, 606 F.2d 919, 926-27 (10th Cir. 1979) (following per se test, but supporting its determination of admissibility with discussion of indicia of reliability); *United States v. McManaman*, 653 F.2d 458, 461 (10th Cir. 1981) (applying indicia of reliability test to rely on decision in earlier *McManaman* decision).

"a firmly rooted hearsay exception,"²¹¹ reasoning that coconspirators' statements are admitted because of necessity and not because they are inherently trustworthy.²¹² Accordingly, the reliability of statements offered under rule 801(d)(2)(E) is tested on a case-by-case basis,²¹³ and

211. See, e.g., *United States v. Massa*, 740 F.2d 629, 639 (8th Cir. 1984) (coconspirator statements are not "firmly rooted hearsay exceptions[s]" from which reliability may be inferred), *cert. denied*, 105 S. Ct. 2357 (1985); *United States v. Ordonez*, 737 F.2d 793, 803 (9th Cir. 1984) (rejecting assertion that coconspirator statements are "*per se* admissible without violating the confrontation clause"); *United States v. Ammar*, 714 F.2d 238, 254-57 (3d Cir.) (coconspirator statements are not firmly rooted hearsay exceptions under Federal Rules of Evidence), *cert. denied*, 464 U.S. 936 (1983).

212. See, e.g., *United States v. Massa*, 740 F.2d 629, 639 (8th Cir. 1984) ("coconspirator statements may be more in need of scrutiny under confrontation clause precisely because . . . they are not admissible because of their inherent reliability"), *cert. denied*, 105 S. Ct. 2357 (1985); *United States v. Perez*, 658 F.2d 654, 600 n.5 (9th Cir. 1981) (coconspirator statements do not bear same degree of reliability as hearsay statements admitted as dying declarations or as prior, cross-examined testimony). The Third Circuit has most fully developed the argument that rule 801(d)(2)(E) is not a "firmly rooted hearsay exception." See *United States v. Ammar*, 714 F.2d 238, 255-56 (3d Cir.), *cert. denied*, 464 U.S. 936 (1983). The *Ammar* court reasoned:

[T]he rationale for admitting evidence under the rules covering hearsay exceptions is different from that used to admit coconspirator statements. Evidence falling within the hearsay exceptions is admissible because of its special trustworthiness. Admissions, on the other hand, are not admitted because of confidence in their inherent reliability. They are instead admitted because a party will not be heard to object that she/he is unworthy of credence. As explained by the Advisory Committee, "Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. . . . No guarantee of trustworthiness is required in the case of an admission." . . .

Rule 801(d)(2) treats coconspirator statements as a category of party admissions. It does so because of the legal fiction that each conspirator is an agent of the other and that the statements of one can therefore be attributable to all. In effect, the Rules have adopted the agency rationale, although the framers recognized that this theory is "at best a fiction."

714 F.2d at 255-56 (citations omitted). For a discussion of the agency rationale of conspiracy, see *supra* notes 3-4 and accompanying text. The *Ammar* Court also reasoned that rule 801(d)(2)(E) cannot be a "firmly rooted hearsay exception" because technically it is not one of the "exceptions" to the hearsay rule under the Federal Rules of Evidence, which are embodied in rules 803 and 804. 714 F.2d at 255. Instead, rule 801(d)(2)(E) defines a category of statements that are not considered hearsay. *Id.* The Eighth Circuit, however, has rejected this argument, reasoning: "While it is true that [*Ohio v. Roberts*] specifically addressed hearsay exceptions, the same interest in face-to-face confrontation is at stake when out-of-court statements of coconspirators are admitted as nonhearsay under the agency theory of Fed. R. Evid. 801(d)(2)(E)." *United States v. Massa*, 740 F.2d 629, 639 (8th Cir. 1984) (emphasis supplied by court), *cert. denied*, 105 S. Ct. 2357 (1985).

213. See, e.g., *United States v. Wright*, 588 F.2d 31, 37-38 (2d Cir. 1978) (requiring trial courts to weigh reliability of coconspirators' statements on a case-by-case basis), *cert. denied*, 440 U.S. 917 (1979).

must be established through a confrontation clause analysis independent of the foundational analysis required by the rule itself.²¹⁴ To test the reliability of coconspirators' statements, these courts have relied primarily on the four indicia of trustworthiness identified in *Dutton*,²¹⁵ although the Tenth Circuit has expanded and modified the inquiry.²¹⁶

The First,²¹⁷ Fourth,²¹⁸ Fifth,²¹⁹ Sixth²²⁰ and Seventh²²¹ Circuits

214. *United States v. Ammar*, 714 F.2d 238, 256 (3d Cir.) (reliability under confrontation clause must be distinguished from admissibility inquiry under rule 801(d)(2)(E)), *cert. denied* 464 U.S. 936 (1983).

215. *See, e.g.*, *United States v. Ordonez*, 737 F.2d 793, 802-03 (9th Cir. 1984) (applying *Dutton* standards for determining reliability). Some courts have held that all four indicia of reliability need not be present. *See, e.g.*, *United States v. Perez*, 658 F.2d 654, 661 (9th Cir. 1981) (under certain circumstances, statement may be admitted even if it fails to pass scrutiny under each prong of *Dutton* test). For a further discussion of the *Dutton* standards, see *supra* notes 179-80 and accompanying text.

216. *United States v. Roberts*, 583 F.2d 1173, 1176 (10th Cir. 1978), *cert. denied*, 439 U.S. 1080 (1979). The Tenth Circuit expanded its list of indicia of reliability to include the following:

(1) what opportunity the jury had to evaluate the credibility of the declarant, (2) whether the statements were crucial to the government's case or devastating to the defense, (3) the declarant's knowledge of the identities and roles of the other coconspirators, (4) whether the extrajudicial statements might be founded on faulty recollection, (5) whether the circumstances under which the statements were made provide reason to believe the declarant misrepresented defendant's involvement in the crime, (6) whether the statements were ambiguous, (7) what limiting jury instructions, if any, were given, (8) whether prosecutorial misconduct was present, etc.

583 F.2d at 1176.

217. *Ottomano v. United States*, 468 F.2d 269, 273 (1st Cir. 1972) (defendant's sixth amendment right to confrontation was not violated by introduction of coconspirators' statements into evidence because statements were "fully admissible under a recognized exception to the hearsay rule"), *cert. denied*, 409 U.S. 1128 (1973). *See also* *United States v. Bautista*, 731 F.2d 97, 100-01 (1st Cir. 1984) (determining that rule 801(d)(2)(E) does not violate confrontation clause, but also finding that statements admitted were presumptively reliable as declarations against penal interest).

218. *United States v. Lurz*, 666 F.2d 69, 80-81 (4th Cir. 1981) (statements permitted under rule 801(d)(2)(E) as exceptions to hearsay rule and admitted as such do not violate confrontation clause), *cert. denied*, 459 U.S. 843 (1982).

219. *United States v. Peacock*, 654 F.2d 339, 349-50 (5th Cir. 1981) (rule 801(d)(2)(E) is firmly rooted hearsay exception and therefore it will be inferred that statements admitted under this exception meet confrontation clause's requirement of reliability), *cert. denied*, 464 U.S. 965 (1983).

220. *United States v. Marks*, 585 F.2d 164, 170 n.5 (6th Cir. 1978) ("Where evidence comes within Rule 801(d)(2)(E), the confrontation right under the Sixth Amendment is not violated, even if the statement clearly implicates the defendant and the declarant is unavailable for cross-examination."); *United States v. McManus*, 560 F.2d 747, 750 (6th Cir. 1977) (statements that "fell squarely within the confines of the narrow coconspirator exception to the [hearsay] rule" did not violate criminal defendant's right to confrontation under sixth amendment), *cert. denied*, 434 U.S. 1047 (1978).

221. *United States v. Chiavola*, 744 F.2d 1271, 1276 (7th Cir. 1984) (refusing to depart from rule that "confrontation clause presents no bar to the use of

have held that statements conforming to the admissibility requirements of rule 801(d)(2)(E) are per se admissible under the confrontation clause. Most courts that have adopted the per se rule simply have reasoned that rule 801(d)(2)(E) falls within the "firmly rooted" category of hearsay exceptions.²²² The courts that have analyzed the bases for the per se rule have argued that its adoption is warranted because it eliminates the need for case-by-case analysis,²²³ and because rule 801(d)(2)(E) provides adequate assurances of reliability.²²⁴

V. ANALYSIS: DOES RULE 801(d)(2)(E) PROVIDE ADEQUATE ASSURANCES OF RELIABILITY?

It is submitted that per se admission of coconspirator statements that comply with rule 801(d)(2)(E), upon a mere showing of necessity, circumvents the confrontation clause's requirement of adequate assurances of reliability. If the category of "firmly rooted hearsay exceptions" discussed in *Ohio v. Roberts* is interpreted to include all *well recognized* hearsay exceptions, then all statements admissible under rule 801(d)(2)(E) may be considered per se reliable. However, the *Roberts* Court, quoting language from *Mattox v. United States*, defined "firmly

extra-judicial coconspirator statements admissible under Rule 801(d)(2)(E)"); *United States v. Papia*, 560 F.2d 827, 836 n.3 (7th Cir. 1977) (adopting per se rule of reliability under confrontation clause for statements properly admissible under rule 801(d)(2)(E)).

222. See, e.g., *United States v. McManus*, 560 F.2d 747, 750 (6th Cir. 1977) (admission of coconspirator statements did not violate confrontation clause because it was within various confines of an exception to hearsay rule) (citing *Campbell v. United States*, 415 F.2d 356, 357 (6th Cir. 1969)), *cert. denied*, 434 U.S. 1047 (1978); *United States v. Ottomano*, 468 F.2d 269, 273 (1st Cir. 1972) (admission of coconspirator's statement did not violate confrontation clause because it was "fully admissible under a recognized exception to the hearsay rule"), *cert. denied*, 409 U.S. 1128 (1973). It has been argued that the reference to "firmly rooted hearsay exceptions" in *Ohio v. Roberts* applies to any "well-established" hearsay exception. *United States v. Ordonez*, 737 F.2d 793, 812-13 (9th Cir. 1984) (Norris, J., dissenting). Judge Norris also has argued that since the Supreme Court drafted the Federal Rules of Evidence, it may be inferred that rule 801(d)(2)(E) complies with the confrontation clause. *Id.* at 814 (Norris, J., dissenting).

223. See, e.g., *United States v. Papia*, 560 F.2d 827, 836 n.3 (7th Cir. 1977) (declining to make confrontation clause reliability analysis "on a statement-by-statement and case-by-case basis").

224. *Id.* In the view of the *Papia* court, the "Confrontation Clause presents no bar to the use of extrajudicial statements of a co-conspirator admissible under Rule 801(d)(2)(E)" because "the community of interests of the coconspirator evidences likelihood of reliability." *Id.* (citing *United States v. Isaacs*, 493 F.2d 1124, 1161 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974)). See also *United States v. Peacock*, 654 F.2d 339, 349 n.1 (5th Cir. 1981), *cert. denied*, 464 U.S. 965 (1983). The *Peacock* Court reasoned that the Fifth Circuit's two-prong procedure for admitting statements under rule 801(d)(2)(E) guarantees a minimum degree of reliability that allows "a declaration to pass muster under the rule of *Ohio v. Roberts*." 654 F.2d at 349 n.1. For an explanation of the Fifth Circuit's two-prong test, see *supra* notes 63-66 and accompanying text.

rooted hearsay exceptions" as those exceptions that "rest upon such solid foundations that admission of virtually any evidence within them comports with the 'substance of the constitutional protection.'" ²²⁵ The *Roberts* Court went on to list examples of hearsay exceptions that provide "indicia of reliability," including dying declarations,²²⁶ cross-examined prior testimony,²²⁷ and business and public records.²²⁸

The hearsay exceptions approved in *Roberts* were cited because they encompassed inherently trustworthy declarations, not because they were widely recognized hearsay exceptions. The *Roberts* Court relied on *Mattox*, in which the Court had reasoned that dying declarations were reliable because "the sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict adherence to the truth as would the obligation of an oath."²²⁹ The *Roberts* Court itself found that cross-examined prior trial testimony was "immune" from confrontation clause attack because it was accompanied by adequate "guarantees of truthworthiness" provided by the adversarial system.²³⁰ The *Roberts* Court also reasoned that business and public records were reliable, citing one commentator's assertion that these are "among the safest of the hearsay exceptions."²³¹ The *Roberts* Court noted that the hearsay rule is riddled with exceptions developed over three centuries,²³² yet the Court did not go so far as to suggest that all these exceptions were "firmly rooted." Thus, it can be inferred from *Roberts* that the "firmly rooted hearsay exceptions" are only those that allow the admission of declarations which provide assurances of trustworthiness similar to those provided by face-to-face confrontation.

The issue, therefore, is whether compliance with rule 801(d)(2)(E), in and of itself, provides adequate assurances of reliability similar to

225. *Ohio v. Roberts*, 448 U.S. at 66 (quoting *Mattox*, 156 U.S. at 244).

226. *Id.* at 66 n.8 (citing *Pointer*, 380 U.S. at 407; *Mattox*, 156 U.S. at 233-34).

227. *Id.* (citing *Mancusi*, 408 U.S. at 213-16).

228. *Id.* (citing Comment, *Hearsay, The Confrontation Guarantee and Related Problems*, 30 LA. L. REV. 651, 668 (1970)).

229. *Mattox*, 156 U.S. at 244.

230. *Ohio v. Roberts*, 448 U.S. at 72-73. The *Roberts* Court noted that prior cross-examination allows counsel "to challenge 'whether the declarant was sincerely telling what he believed to be the truth, whether the declarant accurately perceived and remembered the matter he related, and whether the declarant's intended meaning is adequately conveyed by the language he employed.'" *Id.* (quoting *Davenport*, *supra* note 21, at 1378).

231. 448 U.S. at 66 n.8 (quoting Comment, *Hearsay, The Confrontation Guarantee and Related Problems*, 30 LA. L. REV. 651, 668 (1970)). One commentator has explained that business and public records are inherently extremely reliable, "as the danger of inaccurate memory or narrative on the part of the witness is virtually removed." Comment, *Hearsay, The Confrontation Guarantee and Related Problems*, 30 LA. L. REV. 651, 668 (1970).

232. *Ohio v. Roberts*, 448 U.S. at 62. The *Roberts* Court also noted that the exceptions varied in number, nature, and detail among the jurisdictions and have been developed in a piecemeal fashion. *Id.*

those provided by face-to-face confrontation. An argument in support of the proposition that the rule provides such assurances is that the inclusion of rule 801(d)(2)(E) in the Federal Rules of Evidence was indicative of the drafters' belief that the coconspirator hearsay rule, as adopted, was a firmly rooted hearsay exception.²³³ The Advisory Committee that drafted the Federal Rules of Evidence, however, expressly considered the interrelation between the confrontation clause and the hearsay rule and its exceptions,²³⁴ and concluded that the confrontation clause "extends beyond the confines of the hearsay rule," and that the hearsay rule and its exceptions as encompassed in the Federal Rules of Evidence are to function "as an adjunct to the confrontation right in constitutional areas."²³⁵

In considering the inherent trustworthiness of statements admitted under rule 801(d)(2)(E), it must be recognized that the coconspirator hearsay rule was developed out of necessity and in accordance with what was perceived to be a substantive relationship between agency and conspiracy.²³⁶ Unlike the rules permitting admission of dying declarations or prior testimony, the coconspirator hearsay rule was not developed because it allowed the introduction of evidence which by its nature included safeguards of reliability similar to face-to-face confrontation. If any assurances of reliability are provided by the coconspirator hearsay rule, they are derived tangentially from the foundational requirements of the rule.²³⁷

The requirements that a statement be made "during the course and in furtherance of a conspiracy" tend to decrease the likelihood that statements admitted under rule 801(d)(2)(E) were made subject to faulty recollection or with an incentive to lie.²³⁸ The requirements do not, however, preclude such evidentiary incompetence altogether.²³⁹ The requirement of pendency has been construed in such a way that it is

233. See *United States v. Ordonez*, 737 F.2d 793, 813 (9th Cir. 1984) (Norris, J., dissenting). But see *United States v. Ammar*, 714 F.2d 238, 255 (3d Cir.), cert. denied, 464 U.S. 936 (1983). In *Ammar*, the court argued that rule 801(d)(2)(E) could not be a "firmly rooted hearsay exception" because technically it was defined as non-hearsay. *Id.* However, this analysis would also exclude prior cross-examined testimony from the category of "firmly rooted hearsay exceptions." See FED. R. EVID. 801(d)(1)(A). This result would be inconsistent with the guidelines addressed in *Ohio v. Roberts*. See 448 U.S. at 66 n.8.

234. FED. R. EVID. art. VIII advisory committee note.

235. *Id.* The Advisory Committee noted, however, that the hearsay rule would operate independently of the confrontation clause in "nonconstitutional areas." *Id.*

236. For a discussion of the agency and necessity rationales of conspiracy, see *supra* notes 3-10 and accompanying text.

237. Davenport, *supra* note 21, at 1386-90.

238. *Id.* at 1386-88.

239. *Id.* at 1387-88. Davenport has noted that defects in perception, memory, and sincerity still operate to reduce reliability of statements satisfying rule 801(d)(2)(E)'s foundational requirements. *Id.*

possible for a conspiracy to be deemed to continue indefinitely, and for a coconspirator to be held accountable for statements made both before or after his association with the conspiracy. This construction may implicate occurrences outside a criminal defendant's recollection or personal knowledge.²⁴⁰ Although the "in furtherance" requirement was intended to prevent the introduction of such unreliable statements as boasts and self-serving confessions to the police, it also has been so broadly construed by the courts that it has lost much of its effectiveness.²⁴¹

The most important assurance of reliability provided by rule 801(d)(2)(E) is the requirement that the existence of a conspiracy be proved before a statement may be admitted into evidence. If a conspiracy is clearly demonstrated, then the possibility of defects under the "in furtherance" and pendency requirements is diminished,²⁴² because a trial court will be better able to accurately determine which statements were made in furtherance of that conspiracy, when the conspiracy began and ended, and whether the coercive effect of the ongoing nature of the conspiracy was adequate to insure the declarant's sincerity.²⁴³ The proof of conspiracy requirement, however, has been the most erratically enforced element of rule 801(d)(2)(E).²⁴⁴ The federal courts have been unable to ascertain a single, uniform standard of proof.²⁴⁵ Although standards of proof are rather nebulous concepts and subject to great flexibility in application, they may be the determinative factor in close factual decisions.²⁴⁶ The absence of a clear-cut standard of proof under rule 801(d)(2)(E) has led to confusion among the federal circuits,²⁴⁷ and has deprived trial judges of the guidance necessary to make close decisions of admissibility.²⁴⁸

An even greater problem arises when courts dispense of the re-

240. For a discussion of the application of the pendency requirement in the federal courts, see *supra* notes 117-136 and accompanying text.

241. For a discussion of the application of the "in furtherance" requirement in the federal courts, see *supra* notes 137-52 and accompanying text.

242. Davenport, *supra* note 21, at 1388-90.

243. *Id.*

244. *Means v. United States*, 105 S. Ct. 541 (1984) (White, J., dissenting from denial of certiorari), *denying cert. to* 729 F.2d 1462 (6th Cir. 1984). In *Means*, Justice White observed that rule 801(d)(2)(E) had "given rise to confusion among the lower courts." 105 S. Ct. at 541 (White, J., dissenting from denial of certiorari).

245. 105 S. Ct. 541 (White, J., dissenting from denial of certiorari). For a discussion of the various standards of proof applied by the federal circuits, see *supra* notes 46-71 and accompanying text.

246. C. McCORMICK, *supra* note 46, at 947-48.

247. *Means v. United States*, 105 S. Ct. 541 (1984) (White, J., dissenting from denial of certiorari), *denying cert. to* 729 F.2d 1462 (6th Cir. 1984).

248. C. McCORMICK, *supra* note 46, at 948. Triers of fact must be afforded guidelines by which they may make their decisions. *Id.*

quirement that conspiracy be proved by independent evidence.²⁴⁹ Although most circuits still require that only independent evidence be used to prove conspiracy,²⁵⁰ in those circuits allowing consideration of the very statements sought to be admitted²⁵¹ it is possible to bootstrap unreliable statements of conspirators into competent evidence.²⁵²

As it has been applied, rule 801(d)(2)(E) provides guarantees of reliability far less protective of the sixth amendment rights of criminal defendants than the guarantees provided by the dying declaration, prior cross-examined testimony, and business and public records exceptions. The only remaining argument that has been advanced in favor of treating rule 801(d)(2)(E) as a "Firmly rooted hearsay exception" and admitting all coconspirator statements on a per se basis is that such a rule would eliminate the need for case-by-case analysis.²⁵³ In *Roberts*, the Supreme Court recognized a "need for certainty in the workaday world of conducting criminal trials."²⁵⁴ The Court did not, however, extend this reasoning to the point that evidence admissible under any hearsay exceptions necessarily complies with the confrontation clause. Instead, the Court emphasized that unavailability, and some degree of reliability, are necessary to render a hearsay statement admissible under the confrontation clause.²⁵⁵

VI. CONCLUSION

The problems of reliability related to the introduction of statements under rule 801(d)(2)(E) have evaded resolution by the federal courts. The court of appeals have been unable to agree on a single theory of admissibility under rule 801(d)(2)(E) or on the proper weight to be afforded coconspirator statements under the confrontation clause. In addition, the Supreme Court repeatedly has denied certiorari on these issues, although some Justices have advocated review of questions relating to the standards of reliability to be applied.²⁵⁶

249. See *Means v. United States*, 105 S. Ct. 541 (1984) (White, J., dissenting from denial of certiorari) (discussing the split among the circuits over the independent evidence issue), *denying cert. to* 729 F.2d 1462 (6th Cir. 1984).

250. For a discussion of the requirement of independent evidence to prove conspiracy under Rule 801(d)(2)(E), see *supra* note 97-116 and accompanying text.

251. For a discussion of the circuits that have dispensed with the independent evidence requirement, see *supra* notes 104-07 and accompanying text.

252. See *United States v. Glasser*, 315 U.S. 60, 74-75 (1942) (warning against the dangers of bootstrapping evidence under the coconspirator hearsay rule). For a discussion of *Glasser's* prohibition against bootstrapping, see *supra* notes 99-101 and accompanying text.

253. *United States v. Ordonez*, 737 F.2d 793, 812 (9th Cir. 1984) (Norris, J., dissenting).

254. *Ohio v. Roberts*, 448 U.S. at 66.

255. *Id.*

256. See *Means v. United States*, 105 S. Ct. 541 (1984) (White, J., dissenting from denial of certiorari) (advocating review of foundational requirements of

It is submitted that these issues are now ripe for review. The circuits have settled into their divergent interpretations of rule 801(d)(2)(E) and the confrontation clause. Some reliability could be afforded to coconspirator statements used at trial by identifying proper standards and processes to be used in meeting the foundational elements of rule 801(d)(2)(E). This approach, however, would leave unresolved many reliability problems inherent in the admission of coconspirator statements. A better approach would be to follow a confrontation clause analysis and require that all statements introduced under rule 801(d)(2)(E) be supported by independent indicia of reliability. The indicia of reliability analysis should not be limited to the four criteria listed in *Dutton v. Evans*, but should be expanded to include all factors relevant to the reliability of the statements sought to be introduced.²⁵⁷ As a result, trial judges would be able to focus on the dangers presented by coconspirator statements, prosecutors would have clear guidelines as to the type of statements they may use, and criminal defendants would be afforded the protection guaranteed to them by the sixth amendment.

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rule 801(d)(2)(E)), *denying cert. to* 729 F.2d 1462 (6th Cir. 1984); *Sanson v. United States*, 104 S. Ct. 3559 (1984) (White, J., dissenting from denial of certiorari) (advocating review of question of whether rule 801(d)(2)(E) complies with confrontation clause), *denying cert. to* 727 F.2d 1113 (7th Cir. 1984).

257. For an illustrative list of factors that might be considered relevant to determine reliability, see *supra* note 216.